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THE
DECISIONS
OF THE
COURT OF SESSION.

PRINTED
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EDINBURGH.

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1911

CHORICHO

1911

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THE
DECISIONS
OF THE
COURT OF SESSION,

FROM
ITS FIRST INSTITUTION TO THE PRESENT TIME,
DIGESTED UNDER PROPER HEADS,
IN THE FORM OF A DICTIONARY.

IN WHICH ALL THE DECISIONS IN MANUSCRIPT IN THE LIBRARY OF THE
FACULTY OF ADVOCATES ARE PUBLISHED FOR THE FIRST TIME,
AND THOSE FORMERLY PRINTED ARE CORRECTED ;
WITH ADDITIONS IN NOTES,

By WILLIAM MAXWELL MORISON, Esq.
ADVOCATE.

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1803.

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Watson	Frskine	9886	Watson	M'Kenzie	10188
Watt	Halyburton	9444	Weir	Ruthven	9499
Waugh	Ker	10307	Wemyss	Murray	9636
Wedderburn	—	10151	Wemyss	Courty	9790
Wedderburn	Monargan	9453	Whitlaw	Kirkliston	10060

17

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O B L I G A T I O N.

S E C T. I.

Promise.—Effect upon Heirs?

1623. January 6. KINTORE against SINCLAIR.

THE relict of one Kintore libelled, that by a verbal submission betwixt one Sinclair in Orkney, and her umquhile husband, decreet-arbitral was pronounced and written, decerning Sinclair to pay to her husband L. 100; and that Sinclair, son to the said Sinclair, against whom that decreet was given, had diverse times promised to her that sum; and albeit Sinclair, defender, *alleged*, That she neither being executrix to her husband, nor he heir nor executor to his father, neither she could crave the sum, nor he heir nor executrix to his father; yet the LORDS sustained the pursuit. I contradicted, because the promise was *nudum pactum*, having no preceding cause, and that promises of that kind are not obligatory; because, if a man had not only promised verbally to pay, but to give his obligation for payment, and had directed the bond to be written, might repent, much more this party might resile, since there was no necessary cause of the promise, neither the pursuer having right to the sum decerned, in case the decreet had had a warrant, nor the defender being a party that could be subject to the decreet; nevertheless the LORDS persisted in their opinion, the pursuer finding caution to relieve the defender at the hands of the heir and executors of the defunct.

Fol. Dic. v. 2. p. 15. Haddington, MS. No 2716.

No 1.

A promise found to be obligatory, though but *nudum pactum*, without a preceding cause.

1740. June 16. GORDON of Ellon against Dr CUNNINGHAM.

WILLIAM LIVINGSTON, intending to retire from business, wrote a letter to Gordon of Ellon his brother-in-law, informing him that he had L. 200 Sterling
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No 2.

A person sunk a sum with a friend,

No 2.
giving an obligation, importing that he should not lose by the transaction. The annuitant's heirs were found not bound by this.

in cash by him, which he would willingly sink for an annuity of 12 *per cent.* during life, in accepting of which, says he, you may both serve yourself and me ; and then he adds, " For, if you consider the thing right, I won't have my ' principal and interest in 15 or 16 years ; if I die before that time, you'll be a ' gainer, if I live longer, so as to receive above my principal and interest, ' assure yourself, I shall make it good one time or other to some of yours.' " In consequence whereof, Mr Gordon accepted the L. 200, and granted his bond to Mr Livingston for the annuity, which he paid regularly during Livingston's life ; and, as he lived a considerable time after this bargain, whereby the annuities paid, and interest thereof, amounted to a larger sum than the L. 200, and interest from the time Mr Gordon received it, his heir brought an action against Mr Livingston's successor, upon the above letter, to make up the loss incurred by the advance of the annuity beyond the principal and interest of L. 200 Sterling.

Amongst other defences, it was *pleaded*, That the words of the letter were not capable of being constructed into a legal obligation. Mr Livingston acquaints Mr Gordon, That he had L. 200 which he would willingly sink for an annuity during life. He makes the first offer of this bargain to his friend ; if it had been rejected by him, he would probably next have proposed the bargain to a stranger ; he sets forth the great probability there is of Mr Gordon's being a gainer, the little chance there is of his being a loser, which showed a bargain of chance was to be undertaken, and no absolute security given to Mr Gordon against any possible loss. Mr Livingston computes, that he would not have his principal and interest in 15 or 16 years ; he adds, if I live longer, so as to receive above my principal and interest, assure yourself, I'll make it good one time or other to some of your's. That these words were too general and undetermined for constituting of an obligation which could produce any legal demand ; and suppose Livingston had left a legacy to any of Mr Gordon's family, payable at ever so distant a term, or that he had made a present to any of them in his own life, there could be no doubt, that either the one or the other must have been constructed full satisfaction of the purpose here expressed. Mr Livingston could not, by words of this nature, be understood creating any obligation, either on himself or his heirs ; all that can be gathered from them is, a kindly purpose and resolution he then had to Mr Gordon's family ; but, as they go no further than a resolution, it depended upon an after consideration, whether they were to have any effect or not.

Answered ; That the assurance given in the letter was no compliment, but understood by both parties to be obligatory ; Mr Livingston, on his part, carefully booked his part of the transaction in his copy-book of letters, where it yet remains ; and, of the other part, Mr Gordon wrote on the back of the letter, Mr Livingston's letter, obliging himself, in case I lose by the annuity of the L. 200 Sterling I have received for L. 24 Sterling *per annum*, to make it up

No 2.

to me and mine. Further, that, in a transaction betwixt merchants, an assurance to make good is of the same import as an obligation binding and obliging among persons versed in stile, of which merchants may be presumed to be altogether ignorant. If Mr Livingston had wrote from London to his brother-in-law to pay such a debt for him, or to make a gift in his name to any relation, and at the same time assured his brother-in-law that he would make the money, so to be advanced, good, it is thought Mr Livingston would have been as much bound to repay the money as if he had bound and obliged himself in way of bond to repay it. And although there is no fixed term for the repayment, it will not from thence follow, that the party so obliged was not debtor at all, and that some time or other imports no time. The plain meaning is, he had a discretionary power as to the time of satisfying the debt he had undertaken; but satisfy it he must some time or other, that is, in his lifetime, or by such deed executed in his lifetime as might make it effectual after his decease. And the words of the letter, some of yours, certainly must be taken for one or other of Mr Gordon's children; so that if the defender could show that Mr Livingston had made good this superadvance to any one of the children, it might operate a discharge of the debt; but this cannot be qualified.

THE LORDS found, that Mr Livingston was not bound by his missive letter to make good or repeat to Mr Gordon the annuities paid by his father or himself over the principal sum of L. 200 Sterling, and interest thereof.

Fol. Dic. v. 4. p. 23. C. Home, No 153. p. 263.

SECT. II.

In what cases an offer must be accepted.

1610. July 12. **ANDREW KER** against **CONSTABLE of DUNDEE.**

PARBROTH as principal, and the Constable of Dundee and Dalhousie as cautioners, being bound to John Wemyss for 4000 merks, and he making Strakmertoun assignee, Strakmertoun making Dalhousie, and Dalhousie making Andrew Ker assignee to Parbroth's bond, Andrew charged the constable, who suspended, that Andrew could not charge, because, by his missive, he had promised that he and Dalhousie should bear burden for their parts of the sum, the Constable doing the like for his third, as was agreed, by communing betwixt them, and so Andrew could only charge for the third. Andrew answered, That his offer could not bind him, not being accepted by the

No 3.

A promise made by one of three cautioners, that he, and another of the cautioners, should bear equal burden with the third, of the sum, altho' in effect not accepted by the third cautioner, in so far as he had caused the creditor charge one of the cautioners for

No 3.
the whole
sum, yet was
found obli-
gatory, and
the caution-
ers reason of
suspension
founded
thereupon
was found
relevant.

cautioner, but in effect rejected and refused ; because he had thereafter caused Strakmertoun charge Dalhousie for the hail sum, under the pain of horning, and thereby forced Dalhousie to give him a bond for the hail sum ; notwithstanding whereof, the LORDS found the reason of suspension relevant against my Lord Chancellor's vote.

Fol. Dic. v. 2. p. 15. Haddington, MS. No 1954.

No 4.

1664. June 25.

ALEXANDER ALLAN against Mr JOHN COLZIER.

ALEXANDER ALLAN pursues Mr John Colzier to pay a sum of L. 92 pounds, addebted for the defender's mother, and that upon the defender's missive letter, by which he obliged him to pay the same.

The defender *answered*, Absolvitor ; because, by the missive produced, he offered him to become the pursuer's debtor for the sum due by his mother, being about L. 92 ; but, by a postscript, requires the pursuer to intimate to him, or his friends at Falkland, whether he accepted or not, which he did not then till after the defender's mother's death, and so it being a conditional offer, not accepted, is not binding.

Which the LORDS found relevant and assoilzied.

Fol. Dic. v. 2. p. 15. Stair, v. 1. p. 206.

SECT. III.

Personal Obligation.

LAIRD OF LUNDIE against EARL OF ARGYLE.

No 5.

A bond of a moveable sum being made to be paid to the creditor and his heirs, is found, by the LORDS, to appertain to the creditor's executors, and not to the heir, except the bond had expressly excluded the executors' assignee.

Auchinleck, MS. p. 146.

1627. March 16.

NISBET against CRAUFORD.

No 6.

AN obligation is made by a debtor to his creditor, to pay to him, and his wife, a certain sum, or to the longest liver of them two, their heirs and executors.—

The creditor deceases. The wife, who was the person substituted in the bond, being left executrix to her husband, confirms the said bond in testament, and registers the same at her own instance against the debtor, and charges him to make her payment. The defender suspends, *alleging*, The sum being moveable, came under testament, and so behaved to be the relict's, as executrix, and the charge could not be sustained at her instance, as person substitute. THE LORDS sustained the charge.

No 6.

Auchinleck, MS. p. 145.

1629. February 13. COCHRAN against DAWLING.

AN husband being obliged to employ 10,000 merks to his wife in liferent, and when it was uplifted, to employ the same again as commodiously as he might to her use; and he having employed the same, after his decease, it is redeemed from her and his heirs by the debtor; at the time of which redemption, the heirs being minors, and the curators offering the money to the relict to be employed by herself, and offering their concurrence thereto, which being refused by her, and they desiring her concurrence to seek and find one to take the same for profit, and she not finding any, but refusing to meddle therewith, and the minor having done most exact diligence to get employment, and finding none till mid-term was past, and then being constrained to let it out for a quarter-term's profit, and so contending that they had done all they might, and which the most provident could do in their own affairs, they alleged that they could be no further obliged; notwithstanding whereof it was found, albeit the contract obliged only to employ to the best commodity might be, that for the bygone terms no more should be asked and paid to the liferenter but that quantity which was received for the money; but found, that in time coming, the heirs remained ever and still obliged to the liferenter in annual-rent for that money, of all terms after the term of payment of the money employed by them as is above written, albeit the heirs did never so great diligence, and albeit they should never get it employed, which should not liberate them thereafter.

No 7.

Effect of an obligation to employ money to the best advantage for behoof of another.

Act. *Aiton & Stuart.*

Alt. *Advocatus & Neilson.*

Clerk, *Scot.*

Durie, p. 425.

1630. June 17. CRAUFORD of Carse against LUBBERLONE.

No 8.

A bond bearing the sum to be payable at a certain term, and failing thereof, the master borrower of the sum of 500 merks from his own tenant, by the bond allowed to the tenant 50 merks for the annual-rent of the said sum out of the

No 8.

readiest mails and duty by his said tenant to his master, and that yearly so long as the principal sum was unpaid. The bond was found by the Lords heritable, and not to pertain to the executor but to the heir.

Auchinleck, MS. p. 146.

No 9.

A person in the contract of marriage of his natural daughter, stipulated to her a life rent right in lands, and took a back-bond from her. She never had obtained possession; but her right was preferred in competition with a party in possession.

1632. July 17.

L. AUCHINLECK *against* CATHCART.

THE deceased Lord Cathcart, in his bastard daughter's contract of marriage, is obliged to infeft her and her husband, during their lifetime, and their heirs, in some lands, whereof the daughter sets presently a back-tack to the Lord Cathcart, for payment of a silver duty, of which silver duty there were twenty years paid by the father, but never got any payment from the tenants, nor out of the said lands. The said daughter pursuing upon the infestment granted to her, following upon the said contract, which was a base infestment holding of the granter, the tenants of the lands, for payment of the mails and duties, and they alleging them to be tenants to the L. Auchinleck, who was infeft in the same lands by the Lord Cathcart, holding of him sicklike, and confirmed by the King, and by virtue thereof six years in possession of the very duties of the lands from the tenants, occupiers thereof; likeas, since the decease of the Lord Cathcart, his author, he charged his son to enter to the superiority of these lands, and for not doing has obtained decret of tinsel of superiority, whereupon he is infeft by the King, and in possession both real, by uplifting from the tenants the duties, and also civil, by obtaining sentences against them; likeas the tenants these thirty years bypast ever since paid their duties to the Lord Cathcart, while the L. Auchinleck acquired his right and possession, the pursuer's infestment being ever obscure and unknown, nor ever clothed with possession;—the Lords repelled the allegiance, albeit it was also proponed for Auchinleck compearing with the tenants, in respect of the pursuer's right, which was anterior to the defender's, and that the same depended upon a contract of marriage, and that they got payment of the back-tack duty from the Lord Cathcart, albeit they never had any other possession, either from the tenants, or out of the lands, and albeit these ten years bypast, they had got no payment, and preferred her to the excipient, albeit real possessor.

Clerk, *Scot.*

Durie, p. 647.

No 10.

1634. January 10.

MARKLAND *against* THOMSON.

MARKLAND, relict of Thomson, pursues Thomson, son and executor to her husband, for her third part of a bond of L. 1000, made by Summer, to content

and pay to her husband the sum of L. 1000, he being in life, and failing of him by decease, to the said Thomson, his heir, or executor. The husband dies before the term of payment contained in the bond. The relict pursues for her third, as being in *bonis defuncti* so long as he lived; likeas he might have discharged the sum in his own time, and would have fallen under escheat, and that it could not be of another nature than *donatio mortis causa*. To which it was answered, That *lex obligationis*, and the will of the defunct, the time of the making of the bond, should be more respected, who declared by the express words of the bond, that the sum of it was unpaid to him during his lifetime, should pertain to the substitute in the bond, and to no other person, whensoever he should decease; which exception, the LORDS found relevant, and that the whole sum contained in the bond should pertain to the person substituted; and ordained this decision to be observed.

No 10.

Auchinlock, MS. p. 145.

1637. July 11.

L. LESMORE *against* The LADY.

OLD LESMORE contracting with the relict of his oye, disposes certain lands to her in satisfaction of her conjunct fee, which she accepts, and in the same contract she obliges her to relieve the Laird of the teind duties, addebted and accustomed to be paid out of the said lands; whereupon she being charged to relieve the Laird of these teind duties, and for that effect to make payment of a particular quantity condescended on, as has been in use these diverse years to be paid by the tenants of these lands, before this contract; and she suspending, that albeit the tenants of these lands have been accustomed to pay the quantity charged for, yet that is not sufficient to make her obliged thereto; for that cannot be the mind of the contract, that she should pay any further for the teind duties of the whole barony, whereof these lands contained in this contract are but a part, but only that she should pay a proportion of the whole duty, effeiring to the proportion of her lands to the quantity of the whole barony; for albeit the Laird, who was heritor of the whole barony, might appoint a tenant of any part of the lands of that barony to pay the teind duty addebted for the whole, and allow that payment in the first end of the condition betwixt his tenant and him, yet that was no just cause to astrict her to do the like; neither did her obligation contained in the contract bind her thereto, she being bound to pay the teind duty addebted and accustomed; so that albeit the tenants of these lands had formally paid the whole, yet except the whole were addebted for these lands, she cannot be subject thereto, but to her proportional part only. THE LORDS found this reason relevant, and found, that these words in the contract, viz. to relieve the Laird of the teind duties addebted and accustomed to be paid, could import no further,

No 11.

If one is bound to pay the duties "addebted and accustomed," these terms must be taken conjunctly.

No 11.

but that she ought to relieve him of that proportion of the duties effeiring to the quantity, with the which the whole barony is affected, and as these lands answer to the quantity of the barony, and that the custom of payment of the whole duties out of the lands, cannot burden her with the whole, except that the whole duties acclaimed were due to be paid for the said lands alone; and found, that these words, addebted and accustomed, ought not to be severally understood, but as conjoined.

Act. ———.

Alt. Davidson.

Clerk, Scot.

Durie, p. 851.

No 12.

1665. February 7.

PALLAT against FAIRHOLM.

A person receiving goods in consequence of a letter of credit, continues liable, altho' he may have reason to expect that the writer of the letter has been received as the debtor.

THOMAS FAIRHOLM, merchant in Edinburgh, having written a letter to Peter Pallat, factor at Burdeaux, to loaden him 30 tun of wine;

The tenor of the letter is, that in respect Fairholm was not acquainted with Pallat, he had written upon the credit of his brother Ninian Williamson, factor at London, who was Pallat's ordinary correspondent, to load these wines in that ship which carried the letter, upon Fairholm's account; and bore, That Williamson had provisions to satisfy the same, and that he would either remit to Pallat, or draw upon him, as he found convenient. This letter being sent under a cover of Williamson's to Pallat, the wines were sent into Scotland, and Williamson broke about a year thereafter; whereupon Pallat pursues for his money from Fairholm, who alleged *absolvitor*, because he having demanded the wines, not upon his own credit, but Williamson's, and Williamson having sent under his own cover, as Pallat's letter bears, the said order, in which there being mention, that Williamson had provisions in his hand; his sending the letter of that tenor under his own cover is an acknowledgement, that he had those provisions, and thereby he constituted himself debtor to Pallat, and freed Fairholm; likeas, Pallat acquiesced therein, and drew bills upon Williamson, which were accepted, but not paid, and was silent, never demanding money from Fairholm till Williamson was broken; so that first, Fairholm is free by the tenor of the letter; and next, though thereby he had been bound, yet the damage sustained by Pallat's silence till Williamson was broken, whereby Fairholm was hindered to draw his provisions out of Williamson's hand, and thereby lost the same through Pallat's fault, ought to compence Pallat, and exclude him. Pallat *answered* to the first, that he opened the letters, which bore expressly the wines to be sent for Fairholm's account; so that albeit it mention Williamson's credit, and that he had provisions, it makes him but *expromissor*, and liberates not Fairholm; as to the second, anent the damage, Pallat being secured, both by Fairholm and Williamson, might, at his option, take himself to either, or to both; and cannot be accounted to have done any fault

in forbearance of either, though an unexpected accident of Williamson's breaking intervened; so much the more, as Fairholm's letter does not order to draw upon Williamson; but bears, that Fairholm would either draw or remit at Williamson's conveniency; so that Pallat has not failed in the strict observance of the order. And if need be, Pallat offers him to prove, by the custom of merchants, in the most eminent places abroad, that such letters did never liberate the writer, and Fairholm offered to prove, that such letters did liberate the writer, unless the receiver had protested, and intimated to the writer, that he would not acquiesce therein simply, but also in the credit of the writer.

THE LORDS found, that the letter did not liberate Fairholm, notwithstanding of his forbearance to demand, and therefore repelled the defences, and decerned, but liberated Fairholm from the exchange and re-exchange, in regard of Pallat's silence; neither would the LORDS delay the matter upon the opinion of merchants.

Stair, v. 1. p. 264.

*** Newbyth reports this case :

THOMAS FAIRHOLM being creditor to Ninian Williamson in the sum of L. 800 Sterling, and knowing there was a great trade and commerce of wine betwixt the said Williamson and Peter Pallat, factor in Bourdeaux, upon the 4th September 1658, writes a letter to the said Peter Pallet, in these terms: 'Sir, Although not acquainted with you particularly myself, I have, upon my brother Ninian Williamson's credit, to write unto you that when it shall please God to send Patrick Angus safe to Bourdeaux, to load his ship, for my account, with good wine, such as you did load Archibald Angus his ship, the last year, for my brother Williamson's account, &c. ;' and in the end there are these words, viz. 'and for provision for all you load, both for William Thomson and myself, my brother Ninian Williamson will remit you the same, or order you to draw it on him, as he findeth it most convenient.' This letter being sent open to Mr Williamson, was transmitted thither, under his cover, to Pallat, and Pallat accordingly returns the wines to Fairholm, and in his letters mentions nothing at all that Fairholm is his debtor, nor by the space of 19 months does ever draw upon Fairholm, nor demand payment of the price of the wine; but, by the contrary, does draw a bill of exchange upon Williamson for the price thereof, which Williamson accepted, but thereafter the same was protested for not payment. There are mutual actions raised at these parties instances; at Pallat's, for payment upon the foresaid missive, and at Fairholm's, a declarator that he ought to be free of payment, in regard Pallat had furnished these wines upon Williamson's credit, and that he had acknowledged it by drawing bills upon Williamson for his payment. This action being a merchant business, was many days together debated *in præsentia*, and the great question was the foresaid letter, written by Fairholm to Pallat, whether or no he was, upon his account,

- No 12. debtor thereby for the value of the wines loaded upon his account, and sent home by Pallat, without relation to Williamson's letter. THE LORDS assolized Peter Pallat from Fairholm's declarator, and decerned Fairholm to pay the price of the wines, in regard of his missive letter, which they found to be obligatory against him in law; and found that Williamson, by transmitting the letter under his cover, had only interposed his credit as surety and cautioner for Fairholm.

Newbyth, MS. p. 25.

1665. February 22. SIR GEORGE MOUAT *against* DUMBAR of Hemprigs.

- No 13. SIR GEORGE MOUAT, as assignee to a tocher of 5000 merks, whereunto' umquhile Dumbaith was contractor, pursues Hemprigs, as representing him, for payment. The clause of the contract bore, that the husband should have the tocher out of the first and readiest goods of the wife's father, and that he should have annualrent therefor, but did not expressly oblige Dumbaith to pay, and therefore he is not liable personally, unless he had intromitted with the defunct's means.

THE LORDS found the defender liable, seeing the clause being *in re dotali*, it behoved to be interpreted *cum effectu*, and if it did import only a consent, not to hinder the husband, it signified nothing; and because in cases conceived *passive*, where it does not appear who is obliged, the contractor is understood obliged.

Fol. Dic. v. 2. p. 16. Stair, v. 1. p. 274.

1667. June 14. PATRICK WATT *against* WILLIAM HALYBURTON.

No 14.
Obligation
to infest.

PATRICK WATT, as assignee by Adam Watt his father, to a disposition granted by umquhile — Halyburton to him, pursues William Halyburton, as representing him, to fulfil that part of the disposition, obliging him to procure the pursuer's father infest; and for that effect, that the defender should infest himself, and grant procuratory of resignation, for infesting the pursuer. It was *alleged* for the defender, That he was not obliged to infest the pursuer, because it was his father's fault he was not infest, seeing he had received procuratory of resignation, and precept of sasine, with which he might have infest himself; and though the granter, and he the receiver, lived for twelve or fifteen years thereafter, he was negligent; *2da*, Though the defender were obliged to enter, and denude himself, yet it must be the pursuer finding caution to warrant and relieve him of the hazard of the ward and marriage, because the lands in question being ward through the pursuer's author's fault, the defender's marriage will fall; *3tio*, The defender's father's name was only borrowed by Hallybur-

ton of Eglescairn, who acquired the rights blank, and filled up the defender's name therein, and moved him to dispone.

No 14.

THE LORDS repelled these defences, but reserved to the defender to pursue damage and interest, for any hazard occurred by Adam Watt's fault, as being more proper against his heir, than against the pursuer his second son.

Stair, v. 1. p. 461.

*** Dirleton reports this case :

JAMES HALYBURTON being infeft upon a comprising, in some acres in Dirleton, did grant a disposition of the same to Adam Watt, whereby he was obliged to infeft him by two infeftments ; whereupon the said Adam Watt his son, having right by assignation from his father, pursued William Halyburton as heir to the disponent, for implement and obtaining himself infeft, and thereafter to infeft the pursuer. It was *answered*, That the disposition was in the hands of Adam Watt by the space of twenty years, and that he had made no use thereof ; and that the defender's father had done all that he could, for denuding himself of the said right, the said disposition bearing a procuratory of resignation ; and that the lands holding ward, if the defender should enter, his ward and marriage would fall ; so that unless the pursuer would warrant him as to that hazard, he cannot be obliged to infeft himself.

THE LORDS decerned, reserving action to the defender for damage and interest as accords.

Dirleton, No 82. p. 34.

1702. December 4.

JERVISWOOD, Petitioner.

THERE being a submission entered into betwixt Sir Alexander Bruce of Broomhall, and Alexander Bruce his son, on the one part, and George Baillie of Jerviswood, Sir George Hamilton, and others, on the second part, to four arbiters, with this express quality, that no decreet arbitral should follow thereupon unless all the four agreed ; and they having gone through the whole articles, and, by signed minutes and interlocutors, having agreed thereon, when the decreet comes to be extended on the back of the submission, Sir William Bruce of Kinross, one of the four arbiters, declines to subscribe it ; whereon there is a bill given in by Jerviswood and the rest, craving letters of horning to charge Sir William to give forth his sentence and determination in the case, seeing it was signed by the other three, and they could not get the submission registrated to charge him on his acceptance to decern, because the decreet-arbitral being extended on the back of it, could not be registrated till it was perfected by all their subscriptions. THE LORDS considered, from the title in the Roman law *de receptis*, and by our practice, arbiters might be compelled *ut*

No 15.

An arbiter who has accepted can be compelled to decide, see No 17. *infra*.

No 15. *sententiam dicant* when they had once accepted, and that there was not *locus penitentiae*; but that law could not compel Sir William to concur with the other three in their sentiment, but only to give out his determination as he was persuaded to be just in his own conscience; so the LORDS granted letters of horning against him to this effect, that he might give his opinion as to the claim and controverted points, but nowise to oblige him to join with the other three in their decision, unless he thought it just.

The Lords of Session, and all other judges, are bound *impertiri officium suum*, and to decern when required by the parties; and by the same rule arbiters accepting are tied to do the same.

Fountainhall, v. 2. p. 163.

1708. *January 31.*

HAMILTON of Bangour *against* LORD and LADY ORMISTON.

No 16.

THE LORDS sustained a bond, although the party did therein bind his heirs and successors, but not himself, that subtilty of the common law having been repudiated by the latter constitutions, as a mere nicety.

Fol. Dic. v. 2. p. 15. Fountainhall.

* * * This case is No 118. p. 5909, *voce* HUSBAND AND WIFE.

1708. *July 6.* MR GEORGE SKEEN *against* The LAIRD of SKEEN.

No 17.
In conformity
with No 15.
P. 9435.

MR GEORGE SKEEN of Robslaw, by a petition, represents, that a difference having emerged betwixt the Laird of Skeen and him about the succession to Sir George Skeen of Fintray; and they having submitted to arbiters, who accepted and agreed on the tenor of their decret-arbitral, but one of them was dissuaded to sign by Skeen's influence; therefore craved horning against them to give out their decret in what terms they pleased, without prescribing or imposing on their judgment any manner of way. *Answered*, Where arbiters had not clearness, the Lords could not compel them; and they were willing, seeing both parties did not acquiesce, to let the submission expire. *Replied* That submissions were *ab initio* before acceptance *voluntatis*, but after it *necessitatis*; and as the Lords used to give compulsitors against witnesses to compare before them for clearing points in controversy, so, to make submissions effectual *ad sopiendas lites*, they have been in use likewise to force them to emit their decret-arbitral, but so as to leave them to God and a good conscience in their determination; and so they did lately, Jerviswood, No 15. p. 9435., in ordering Sir William Bruce, one of the arbiters, to give his opinion in what

terms he pleased. THE LORDS inclined to grant it, but had no occasion, in regard the parties agreed among themselves.

No 17.

Fountainball, v. 2. p. 449.

1725. February 3.

WILLIAM HUTTON and the CREDITORS of THOMAS WHITE *against* JAMES GRAY
Writer to the Signet.

THOMAS WHITE elder disposed to his son in his contract of marriage certain lands and tenements, with the burden of his son's paying to Elizabeth White his eldest daughter of the first marriage 3000 merks; and this burden was repeated in the procuratory of resignation and precept of sasine upon which the son was infeft. The 3000 merks were assigned by the daughter; and the creditors of the assignee having adjudged, they craved preference to the creditors of the son, upon this ground, that the burden was real, not only by the conception of the clause, but from its being repeated in the procuratory and precept, upon which the son's infeftment was taken.

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It was *answered*, That the clause being only with the burden of payment, it could have no stronger effect, than if the son, by the quality of the right, had obliged himself to pay; and therefore though it was inserted in the procuratory and precept, yet it was no real burden.

THE LORDS found, that the obligation on Thomas White younger to pay 3000 merks to his sister Elizabeth was only personal.

Reporter, Lord Cullen. Act. H. Dalrymple. sen. Alt. Ch. Binning. Clerk, Mackenzie.
Edgar, p. 163.

1751. January 29.

HENRY ALLAN *against* the KING'S ADVOCATE.

HENRY ALLAN writer in Edinburgh, was cautioner for James Lord Balmerino, in a considerable sum, which he was obliged to pay, together with the interest due thereon, and with L. 7 of expense of diligence used against him. This payment was made after the principal debtor's death, and after a forfeiture incurred by his brother and heir Arthur Lord Balmerino.

No 19.

Mr Allan claimed upon the Lord Balmerino's estate. for the sums paid by him.

Answered, His claim can only be sustained for the principal and interest; but with regard to the expenses recovered against him out of the penalty in which he was bound, it is enacted, 'that no decree shall be made for any sum

No 19.

' or sums on account of penalties, for failure of payment, at the day it became due, or for any other penalty whatsoever.'

Replied, Mr Allan will recover no part of the penalty in his bond of relief; but what he has paid of the penalty of his own bond the Lord Balmerino was bound to relieve him of; and it is no penalty.

THE LORDS sustained the claim.

D. Falconer, v. 2. No 188. p. 227.

S E C T. IV.

Whether an obligation or a resolution only?

No 20.

1662. July 25.

NASMYTH *against* JEFFREY.

A LEGACY left in terms 'I wish, &c.' was found sufficient, and was not considered as a desire only, or recommendation left in the option of the heir.

Fol. Dic. v. 2. p. 16. Stair.

. This case is No 53. p. 5483, *voce* HERITBLE AND MOVEABLE.

1681. December.

No 21.

BEATRIX TUNNO and BROTHERSTONS *against* ANDREW TUNNO.

ONE having received a letter abroad from his friend, that there was a treaty of marriage with his sister on foot, and the man desired 400 merks of portion; he wrote back to that friend, that he was willing to give 200 merks to forward the design; who giving the letter to the suitor, the parties were afterwards married, and they pursued the brother upon it for payment of the 200 merks. It was *alleged* for the defender, That the letter was no positive obligation, but the declaration of a bare resolution, and though it were thought to import a promise, the offer was not accepted.

THE LORDS decerned the defender to pay the 200 merks.

Fol. Dic. v. 2. p. 16. Harcarss, (CONTRACTS OF MARRIAGE.) No 339. p. 82.

1712. *January 2.*

WILLIAM REOCH Wright in Edinburgh *against* CATHARINE YOUNG Relict,
ALEXANDER CRAWFORD Residenter there.

JEAN TELFER Madam Stewart, who lodged in the house of Catharine Young, having, when she was dying, upon Thomas Mackie's coming in to see her, desired Catharine to bring her a napkin, wherein she said there was a L. 20 Sterling bank-note, which she designed to give to Mr Mackie, as a token of her kindness; and seeming to be in a passion, and disturbed to find the napkin brought to contain nothing but a blank piece of paper, Catharine Young said to Mr Mackie, that she would make up the L. 20 to him, in case it was not made up another way.' William Reoch, to whom Mr Mackie assigned his claim, pursued Catharine Young for payment of the L. 20, conform to the promise, which was referred to her oath. She acknowledged the above matter of fact, but *alleged*, *imo*, The words uttered by her do not amount to an obligatory promise called in law, pollicitation or offer, which doth not bind unless accepted, *L. 3. D. De Pollicit. Grotius de Jure Belli*, Lib. 2. C. 11. § 3. & 4; *Stair, B. 1. T. 10. § 3.*, *Allan contra Collier*, No 4. p. 9428., and resolves only in a promise to gift, or to give charity, which cannot produce action; *zdo*, The words spoke by the defender were merely *verba jactantia*, passing words, uttered, not *animo deliberato*, or for any onerous cause, but from a sudden motion of the affections, to prevent the trouble of a dying lodger, which cannot oblige the speaker, otherwise men should be ensnared with the words of their lips; *3tio*, The promise being accessory to the gift or legacy designed for Mr Mackie, and importing only that he should lose nothing through the bank-note's being away; the pursuer who got no right to that bank-note from the defunct, and though it were on the table, could not touch it, as belonging to the defunct's executors, to whom thereafter she conveyed her means, without any express burden of such a legacy, cannot claim L. 20 from the defender, whose accessory obligation falls in consequence with the principal right.

Replied for the pursuer, He is not concerned to inquire into the motives that induced the defender to make this promise, these she herself can best account for. It is enough for him to found on a plain and solemn promise made to a dying woman; and promises made at such times being most serious and binding, are not revockable, *Gordon contra Pitsligo*, No 28. p. 8415.

THE LORDS found the oath proved the promise, and that the defender is liable for the L. 20 Sterling, unless she can instruct that Mackie recovered payment some other way.

Fol. Dic. v. 2. p. 16. Forbes, p. 568.

No 22.

A dying person desired her landlady to bring her a napkin, in which there was a L. 20 note, which she meant to give a certain person. When the napkin was brought there was nothing in it. The landlady said she would make it good to the donee. Found liable.

No 12.

** Fountainhall reports this case :

1712. *January 3.*—ONE Madam Stewart being lodged in the house of one Catharine Young, relict of Alexander Crawford, and falling sick, she told her landlady, that she had sundry bank-notes and pieces of gold she resolved to distribute among her friends ; and amongst the rest, there was a L. 20 Sterling bank-note wrapt up in a napkin ; and Thomas Mackie coming in to see her, she called for the napkin that she might give him that note ; but when brought, behold the bank-note was not there ; at which Madam Stewart turned very angry with Mrs Crawford ; and she, to pacify her, forbade her to be disturbed. for she would make good the L. 20 Sterling to Mackie, if it were not made up to him another way. Mackie, and William Reoch his assignee, pursue Mrs Crawford for payment on her promise, referred to her oath ; and she depones, That she did say words to that purpose, that she should make it up if he got not payment of it another way. When this oath came to be advised, it was *alleged* for Mrs Crawford, defender, That it was no positive promise, but a mere pollicitation and offer, noways made *animo deliberato*, but by surprise, on a sudden emotion of the affections, to prevent and compose the passion and trouble her dying lodger was in, and so was not obligatory without immediate acceptance, and was never claimed till five or six years after her death ; and it was so found 15th June 1664, Allan *contra* Colzier, No 4. p. 9428., where an offer not accepted did not bind. And Stair, B. 1. Tit. 10. § 3. makes a plain difference betwixt a pollicitation and promise ; and so does the Roman law, l. 3. De pollicitat. and confirmed by Grotius, De jure belli et pac. lib. 2. cap. 11. and Puffendorff, lib. 3. cap. 5. De jure naturæ et gent. to whom we may add the famous Cujacius. 2do, The words were but *verba jactantia* without design to oblige, but only to quiet the lady. And though the canon law says, ‘ omne verbum de ore fidei prolatum cadit in debitum,’ yet that is only *debitum in foro divino*, but has not always the *vinculum juris humani*. How oft in converse will one say, I will warrant the debt to be good, I would take it myself, &c. where there is no serious design to oblige ? And *esto* the bank-note were lying there he could not crave it, seeing he cannot prove that she designed it for him ; and *esto* he could, it would at best only amount to a nuncupative legacy, which stands only good for L. 100 Scots. *Answered*, That distinction of pollicitations and promises was but a nicety of the Roman law ; but here is as positive as could be. And Dirleton observes, that on the 12th of November 1674, Gordon *contra* Pitsligo, No 28. p. 8415, the LORDS found, that though there was *locus pœnitentiæ* in synallagmas, yet there was none in simple and absolute promises ; and as to the quality adjected, they of consent found it relevant to assoilzie her, if she could prove he got payment *aliunde*. And though she pretended there was no onerous cause for so binding herself but only to pacify the lady, this was one of the arguments that proved too

much; for this would liberate all cautioners, and annul hundreds of deeds given for love and favour; besides her negligence in letting it be lost in her house, on the edict *nautæ cautiones*. Neither is it of any weight, that it is only a verbal legacy; for that restriction only holds where it is left payable after their death; but here the bank-note was called for to have been instantly delivered in her lifetime; and her promise needed no present acceptance; for they may be made to infants, idiots or absent, and yet bind; and it is a mere quibble to say he did not declare his acceptance; for who in his right wits would reject and repudiate such an express offer? THE LORDS found the promise obligatory, and sufficiently proved by her oath; but allowed her yet to instruct he was *aliunde* paid, if she would burden herself therewith.

Fountainhall, v. 2. p. 697.

No 22.

1717. July 10.

PATERSON *against* INGLIS.

A DEBTOR's relict having written in the postscript of a letter, not to the creditor, but to a third party, these words: 'Shew such a person that if I were come, &c. she shall be paid, &c. if it be His holy will to spare me;' the LORDS found that these words not only imported a resolution, but an obligation. See APPENDIX.

Fol. Dic. v. 2. p. 16.

No 23.

1723. January 2.

KENNEDY *against* KENNEDY.

HUGH KENNEDY disposed his estate upon death-bed in favour of his son, and failing him, to Sir John Kennedy. After the son's death, this deed being called in question by Hugh Kennedy of London, a remote heir, Sir John Kennedy *alleged*, That the son, apparent heir at the time, had homologated the deed, which made it unquarrellable by any remoter heir; and he produced a missive letter in these words: 'Depend on it, I shall adhere to that right my father made failing me in your favour; and that you may give the more credit to what I here aver, I have made no other title to my estate, but have used the same as my evident.' It was *pleaded*, That this did only import a resolution, but no direct ratification or homologation; which accordingly the LORDS found. See APPENDIX.

Fol. Dic. v. 2. p. 16.

No 24.

1737. January 28. PATRICK ROBERTSON *against* MACKENZIE of Fraserdale.

THE deceased Lord Prestonhall, *anno* 1710, granted a bond to Agnes Cockburn, his servant, bearing, That he was justly resting and owing her the sum of

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No 25.
Found that
a bond for an
onerous cause,
bearing, that,
in case it was

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resting unpaid at the creditor's death, it should belong to the debtor's heir, might be gratuitously assigned, although resting at the creditor's death.

1000 merks, which he obliges himself, his heirs, &c. to pay to her at Martinmas then next, after which is subjoined the following clause : ' And in case the said Agnes Cockburn shall not call for the said principal sum, and uplift the same, with the annual rents thereof, before her death, then, and in that case, the said sum, with the annual rents thereof, or what part of the same shall be resting unpaid at the said time, is hereby declared to belong to Alexander Mackenzie of Fraserdale, my son, with the burden of the said Agnes Cockburn, her burial, in such way and manner as she shall appoint before her death.' Agnes assigned this bond to Patrick Robertson, who, after her death, intended a process against Fraserdale, as representing his father, for payment.

The defence was, That the bond being granted partly for wages, partly as a remuneration for faithful services, was plainly intended as a fund of maintenance for the said Agnes Cockburn ; not that she should have liberty to alienate the same in prejudice of the defender, to whom, by the tenor thereof, it was to belong, in case she died without uplifting the same. It was owned she might have spent the money, and that her creditors, during her life, could have attached it ; but, that her power and property therein died with herself ; therefore the bond fell to be considered as conditional, payable to Agnes, secluding heirs or assignees ; and, failing her uplifting it, to the defender.

2dly, The clause imports a return in favour of the granter's heir, which is more than a simple destination, so that a prohibition to alter gratuitously is implied ; of consequence, the pursuer should prove the onerous cause of granting the assignation ; for the narrative thereof, bearing that the assignee had made payment to the cedent of sums equivalent to the bond assigned, is not evidence sufficient of the onerosity ; otherwise, every person who was under a prohibition to alienate gratuitously, might render such limitations elusory and ineffectual.

Answered ; That the clause, upon which the defence is founded, imports no more than a substitution in favour of Fraserdale, whereby the debtor was taken bound to pay the money, in case it remained unuplifted, which could not disable the creditor, to whom it was payable simply, without any condition to dispose thereof. It is true, Agnes preferred Fraserdale to her own executors, but there is nothing in the bond that shows she intended to tie up her own hands ; *2dly*, The assignation was granted for an onerous cause, and the narrative thereof presumes the fact to be so, the cedent and assignee not being conjunct persons ; but, whether onerous or not, is no way material, seeing she could have gratuitously altered the substitution.

THE LORDS found, That the bond being for an onerous cause, Agnes Cockburn could assign it gratuitously.

C. Home, No 51. p. 90.

No 26.

A letter from a brother to a sister, pro-

1751. November 29. MARGARET KER against KER of Keith.

MARGARET KER, and John Stevenson, her husband, pursued Alexander Ker of Keith, her brother, upon a missive letter wrote by him to her, in these terms,

' Dear sister, I always designed to make a bond of provision in your favour, for L. 500 Sterling, and I assure you I will do it upon demand.'

Answered, The letter only expresses what was the writer's present intention, and does not import any obligation upon him. If it is obligatory, it is to grant a bond of provision; and, as it does not set forth the terms thereof, must be understood according to the ordinary terms of provisions, and be payable at the granter's death; as also to imply such conditions as might be reasonable for a brother giving a gratuitous provision to a sister to adject thereto, such as that she should marry with his consent, at least she should marry suitably, which she has not done, her husband being one of the defendant's tenants.

Replied, The promise was not wholly gratuitous; the defender and pursuer were both left unprovided by their parents, so that she had gone to service; but he, who was bred a merchant, and was set up, though with small stock, persuaded her to live with him, and direct his family, which she did for fifteen or sixteen years, during which time he made a considerable fortune. The letter contains no conditions, but is a positive promise; and her marriage has not been so unsuitable as is alleged, her husband's stocking upon his farm being worth L. 200 Sterling, and he having a term to run of twelve or thirteen years of a farm paying L. 78 Sterling.

THE LORDS repelled the defences, and found the defender obliged to pay the sum of L. 500 Sterling, with interest from the date of the execution of the summons, or grant bond therefor at the sight of the Lord Ordinary.

Act. Ferguson. Alt. R. Craigle. Reporter, Justice Clerk. Clerk, Forbes.

Fol. Dic. v. 4. p. 23. D. Falconer, v. 2. No 238. p. 290.

No 26.
mising her a
bond for a
sum, found to
oblige him to
grant it, free
of all clog-
ging condi-
tions.

SECT. V.

Obligation to grant a Right.—Whether such an Obligation be equivalent, as if the Right were granted.

1629. December 16.

HUNTER against His TENANTS.

IN a removing, the defender defending with a contract of wadset, and actual possession by the pursuer's author, the same was repelled against this removing pursued by a singular successor. *Item,* The said contract providing, that the defender shall be kindly tenant for the old duty, after the redemption; this also was found not to defend him against this pursuer, because it was conceived

No 27.

- No 27. in terms of an obligation, to receive him a kindly tenant, and was not by words of the present time.

Act. ———.

Alt. *Hart.*Clerk, *Hay.**Durie, p. 474.*1734. *January 17.*SINCLAIR *against* SINCLAIR.

No 28.

A PERSON who had right to lands by disposition, containing procuratory and precept, without infeftment, granted a personal obligation to convey the same to one, and thereafter the disposition was adjudged by another. The creditor in the personal obligation *pleaded* preference upon this *medium*, That an obligation to assign a personal right, is a virtual assignation, by which the common author was denuded before leading the adjudication, according to the brocard, that a personal conveyance denudes of a personal right. On the other hand, it was *pleaded*, That an obligation to grant a right may be equivalent to the right itself, where the question is with the obligant, but never can be in competition with third parties, especially where the right to be granted is a procuratory or precept, an obligation to grant which will be no warrant for infeftment. THE LORDS found, That the obligation to convey the disposition in question, did not transmit the same, but that it did remain in the debtor's person, subject to the posterior diligence of creditors.—*See APPENDIX.*

*Fol. Dic. v. 2. p. 17.*1737. *January 26.*Sir JAMES DALRYMPLE of Hailes *against* HEPBURN of Binston.

No 29.

IN the year 1629, the parson of Prestonhall granted a tack of teinds, expiring in February 1728. In the end of the tack there is an obligation upon the granter and his successors, parsons of the said parish, after the ish of the present tack, to renew the same in favour of the tacksman and his heirs, for the like number of years, and the like tack-duty. The question was, If this obligation to renew was real and good against singular successors in the right to the teinds, so as to defend the tacksman and his heirs against the patron, who obtained right to the said teinds, in virtue of the act 1693, before any possession could be had upon the said obligation? It was *pleaded* for the tacksman; The obligation to renew is of the nature of a prorogation, which is a real right, and this must have been the meaning of parties; for, considered as a personal obligation, it could have no effect beyond the granter's life, seeing he could not bind his successor in office. *Answered* for the patron, Had the lands fallen below the tack-duty, there was no obligation upon the tacksman to continue in possession, and pay the tack-duty, after expiration of the tack in 1728. This obligation, then, can never be

understood the same with a tack, or a prorogation of a tack, since it is not so much as a mutual contract.—THE LORDS found the obligation not effectual against a singular successor.—See APPENDIX.

No 29.

Fol. Dic. v. 2. p. 17.

1749. *January 18.* *MERCERS against MERCERS and JAMIESON.*

THOMAS MERCER, Depute Commissary Clerk of Edinburgh, was thrice married, to Sarah Baird, Anna Smart, and Elizabeth Jamieson, by each of whom he had issue; and by his contract with Anna Smart, he became bound to settle 12,000 merks of his own money, together with 6000 merks received of tocher, on himself and spouse, in conjunct fee and liferent, and on the heirs and bairns of the marriage in fee, to whom also he bound the whole conquest; 'providing, that the bond of provision granted, or to be granted to Thomas, Laurence, and Sarah Mercers, his three children of his former marriage, for the sum of 6000 merks, bearing annualrent, was and should be free and forthcoming to the said three children, out of the first and readiest of what stock the said Thomas Mercer had already acquired, or should happen to acquire, and should be in satisfaction to them of all that they, or either of them, could ask, claim, or crave, by or through the decease of the said Thomas, their father, any manner of way, heritable or moveable, whensoever the same, at the pleasure of God, should happen, except there were no children procreated betwixt the said parties; and failing of them, or any of them, by decease, the deceiver's part to fall, accresce, or pertain to the bairn, one or more, to be procreated betwixt the said Thomas Mercer and the said Anna Smart, equally and proportionally amongst them.'

No 30.

A contract of marriage, settling the conquest, with exception of a bond, granted or to be granted to the husband's children of a former marriage, found to give them a right, tho' no bond was ever granted.

Jean, the only child of Anna Smart, was married, and, with concurrence of her husband, entered into a submission with her father, upon her claim on her mother's contract of marriage, and particularly on the substitution in her favour, to the shares of two of the children of the first marriage, deceased without issue; and a decret-arbitral was pronounced.

Thomas Mercer younger, predeceased his father, leaving children; and Thomas Mercer elder, left, at his death, considerable effects to Elizabeth Jamieson and her children; whereupon the children of Thomas younger pursued them for 2000 merks, provided to their father by the contract betwixt Thomas elder and Sarah Smart.

Answered, There is in that contract no obligation in their favour, but only a provision, that a bond granted or to be granted, should be free and forthcoming to them, and no such bond was ever granted.

THE LORD ORDINARY, 9th June 1748; "in consideration of the whole circumstances of the case, repelled the defences pleaded for the defenders, and found them liable to the pursuers for the principal sum and annualrents libelled."

No 30.

Pleaded in a reclaiming bill; The intent of the clause was to have it in the power of the father to provide for the children of the first marriage, notwithstanding the obligation he came under by the contract with his second wife, but not to bind him up to give them these sums; and accordingly there is no obligation in their favour, but a faculty reserved to him of granting bonds of provision. To consider this as an obligation would infer an inconsistency, as it is stipulated in favour of the children of Anna Smart, that they should succeed to the shares of those that should fail. Now, as the power of division behoved to remain with him, he could elude this substitution, by allotting the whole sum, or near it, to the survivors; but considering it as a faculty, there arose no debt, and consequently no substitution till the bond was actually granted.

No inference can be drawn from the submission betwixt Thomas Mercer and his daughter Jean, of her right of substitution, as she submitted all pretences, and her claim was the same, whether the shares of the deceased never were a burden on the sums in her mother's contract, or returned to her by the substitution. The bond, in fact, was never granted to Thomas Mercer, in regard of his having received more from his father in his life.

Answered; Thomas Mercer's intentions, when he entered into the second marriage, was to provide the children of the first, as it was reasonable he should, and therefore he burdened the contract with 6000 merks to them, over which he reserved no power of division, as he substituted the children of the second marriage *per capita* to the deceasers. A substitution to a right is proper, but a substitution to a faculty is something unheard of; and Jean having right to this substitution, he entered into a submission with her upon that right. There could have been no dubiety, if the clause had not referred to a bond to be granted, which does not appear; but this is only *falsa demonstratio*, and there is no evidence the debt was satisfied in the lifetime of young Thomas Mercer.

THE LORDS adhered.

Act. Lockhart.

Alt. Ferguson.

Clerk, Kirkpatrick.

Fol. Dic. v. 2. p. 24. D. Falconer, v. 2. No 46. p. 44.

No 31.

1753. August 11.

STEPHEN BROOMFIELD of Mains *against* JOHN YOUNG of Shankfoot.

A minute obliging parties to extend a tack on stamped paper, under a penalty, but not bearing 'attour per-formance,' is binding, and cannot be resiled from on paying the penalty.

By minute of tack, dated 9th April 1750, Stephen Broomfield set to John Young the lands of Hassendean for the space of five years, for which Young was to pay a certain yearly tack-duty; and the minute concludes with these words, 'And all parties agree, that this minute be extended on stamped paper, betwixt and the first of May, under the penalty of L. 10 Sterling, to be paid by the party failer to the party observer or willing to observe.'

A few days after the date of the said minute, John Young intimated under form of instrument to Stephen Broomfield, that he resiled from the agreement of entering into a five years tack; whereupon Stephen Broomfield brought a

process against him, concluding that he should be obliged to enter into a tack of the said lands, and to perform all the stipulations incumbent on him by the said minute.

Pleaded for the defender, That he can be no further liable than to pay the penalty of L. 10 Sterling, as the minute does not bear that the penalty was to be paid by and attour performance; and therefore each party was at liberty to resile from the bargain upon payment of the penalty. Penalties were first introduced by the Roman lawyers in obligations of this kind, *quæ in facto consistunt*; because if the fact was not performed, the creditor had an action *ad damnum et interesse*; but as this damage was always uncertain and illiquid, and depended upon a difficult proof; to prevent these questions, penalties were adjoined to such contracts; which penalties were understood to come in place of and to liquidate the *damnum et interesse*, as is plain from § 7. *Inst. De verb. oblig.* From the example of the Roman law, penalties are with us usually adjoined to contracts which consist in performing any thing; and the same construction must take place that these penalties stand for the damage in case of not performance; and therefore where performance is to be insisted for, it is provided by the contract, that the penalty shall be paid by and attour performance; and where that clause is not added, the Lords have found that the penalty only is due; Forbes, 27th July 1706, Bairdner against Drysdale, *voce* PENALTY.

Answered for the pursuer, That the adding of a penalty does not give the parties an election of either performing the obligation or paying the penalty as they please, Stair, *Inst. L. 1. T. 17. § 20.* the penalty being only added as a compulsive on the debtor to fulfil, and to be a fund for paying the expenses of compelling performance; though these words 'by and attour performance,' be commonly added, yet that is only *ob majorem cautelam*; and though they be not added, yet the parties are obliged to perform their contract if it be in their power, as it is only *loco facti impræstabilis*, that *damnum et interesse* succeeds. The case cited by the defender from Forbes, was a fact of this last kind, the defender having obliged himself under a penalty to cause a third party subscribe a disposition to lands; and as the defender could not compel the third party to subscribe the disposition, he could only be liable in the penalty; but where the fact is prestable by the defender, he must perform it, if the pursuer insist for performance, as the Lords have frequently found; particularly 19th March 1630, Crichton *contra* Pirie, *voce* PENALTY; and 27th December 1695, Beattie *contra* Lambie, *IBIDEM*.

"THE LORDS repelled the defence, that the defender was only obliged to extend the minute on stamped paper, under the penalty of L. 10 Sterling, and found him liable in that penalty, the same being expended; and also found him liable in payment of the bygone rents already fallen due, and of the rents which shall become due in time coming, in terms of the minute of tack."

Act. Geo. Pringle.

Alt. And. Pringle.

B.

Fol. Dic. v. 4. p. 24. Fac. Col. No 89. p. 134.

S E C T. VI.

Obligation to grant a provision by advice of friends.—Obligation granted in implement of an unlawful promise.

No 32. 1717. July 9. GORDONS *against* GORDON.

AN heir having obliged himself to provide the younger children by the advice of five friends therein named, in what he should be able, upon their arrival at perfect age; when the term was come, three of the friends, by a writing under their hand, modified the sums to be paid, but without calling the heir, or meeting together, their subscriptions having been obtained separately; and as to the other two, the one was dead and the other refused to subscribe.—THE LORDS found that the friends could not legally determine, without calling the heir, and without being met together.—*See APPENDIX.*

Fol. Dic. v. 2. p. 17.

No 33. 1718. February 8. POLLOCK *against* CAMPBELL of Calder.

IN a son's contract of marriage, the father having become bound to provide his estate to his son and the heirs male of the marriage 'free of all charge and 'burden,' and having reserved no power to provide younger children, he, at the same time, privately elicited from his son a promise to grant him a faculty of burdening the estate with a certain sum to his younger children, which promise the son having fulfilled after the marriage, by granting a bond upon the narrative of the promise, and that the contract of marriage had been entered into by the father, in compliance with the bride's friends, that there might be no stop to the marriage; the LORDS reduced the bond, at the instance of the heir male of the marriage, as being granted in consequence of an unlawful promise *contra fidem tabularum nuptialium*; for though of itself it be a lawful and reasonable deed for a man to provide his brothers and sisters, and the bond must have stood had it been granted *ex proprio motu*, yet where a man grants an obligation conceiving himself bound where he is not, or led by a scruple of conscience to fulfil a promise which ought not to have been exacted of him in these circumstances, and which the law reprobates, such obligation cannot be effectual.—*See APPENDIX.*

Fol. Dic. v. 2. p. 18.

See IMPLIED OBLIGATION.

See APPENDIX.

PACTUM DE NON PETENDO.

1624. March 20.

JOHN MAKIESON *against* JOHN RAMSAY.

No 1.

JOHN MAKIESON being pursued by John Ramsay, Prior Letham, for payment of 500 merks, excepted upon a promise of Mr Simon Ramsay's, (who was donatar to John Ramsay's escheat), never to seek it of him. *Replied*, That the donatar had put the pursuer in his own place again.—THE LORDS sustained the charge, because they thought that he being reponed, could not be prejudged by any promise of his donatar.

Fol. Dic. v. 2. p. 18. Spottiswood, (PROMISE.) p. 248.

M'MATH *against* MONTEITH.

No 2.

THERE being a bond granted by the deceased James Nisbet, William and James Arnots, all conjunct principals, to Gilbert Gourlay, for a sum of money, whereupon Gilbert comprises the said James Nisbet's lands; thereafter the said Gilbert assigns the debt and comprising to the deceased Sir William Nisbet, brother to James, with an express condition, That he should use no execution against the two Arnots; and Sir William transfers his right to William Monteith of Egilshaw, upon the same condition, who disposes the same to William Monteith, his son-in-law, who enjoys the land by virtue of the said comprising, being now long expired. Elizabeth M'Math being executrix to the deceased William M'Math, her father, and who gets a decret *cognitionis causa* against the apparent heir of the said umquhile James Nisbet, and adjudges the said land; and upon the said adjudication, with concurrence of her husband, Mr John Anderson, pursues a reduction of the said Monteith's right, upon diverse reasons, specially, That the assignation granted by Gourlay to Sir William Nisbet, and the translation granted by him to Monteith, both contain the said provision,

A creditor, in assigning a bond, granted by diverse *correi*, may provide that the assignee is not to use execution against some of them; but this hinders not the assignee to seek the full debt from the rest, nor does it liberate the *correi*, in whose favour it was made, from a proportional relief.

No 2.

That they should not use execution against the said Arnots, who were *correi debendi*, which being *pactum de non petendo*, is equivalent to a discharge of their parts of the debt, and consequently makes the comprising null and extinct, at least as to the two parts : It was *answered*, That the reason of reduction is not relevant, because all three being bound conjunctly and severally, it was lawful for Gourlay to use execution against any one, or all, at his pleasure ; and in the assignation, he might also provide, That the assignees should not use execution against two of them, but the third only, which noways did exoner the third *Correus*, unless the assignation had granted the receipt, of the other two, of their parts, and had discharged them thereof ; and that provision of not using execution against the two, could not impede the third, who was distressed, to seek his relief against them, notwithstanding of the said provision, unless they had paid and been clearly discharged.

THE LORDS found the answer relevant.

Fol. Dic. v. 2. p. 18. Gilmour, No 145. p. 104.

1680. July 10.

LEITCH against HEDDERWICK.

No 3.

A *pactum de non petendo*, made to a principal, frees not the cautioner.

Fol. Dic. v. 2. p. 18. Stair.

* * * This case is No 10. p. 2077. *voce* CAUTIONER.

1685. February.

WOOLMET against FLEEMING and CUNNINGHAM of Barns.

No 4.

Found in conformity with M^r Math against Monteith, No 2. p. 9449.

CUNNINGHAM of Barns being cautioner in a suspension for John Wilkie and others, wherein a decret was obtained, but again suspended by Wilkie and Barns ; in which suspension, Hog and Bigger of Wolmet were cautioners ; the creditor in the bond assigned the same against the principal and cautioners therein, and against the cautioners in the second suspension, but not against Barns, the cautioner in the first suspension, whom he discharged. The assignee having pursued Hog, who *alleged*, That he being cautioner for Barns, who was a suspender, and principal *quoad* him, and Barns being discharged, he must be free also ;

Answered for the pursuer ; The discharge given to Barns was without an onerous cause, and but *pactum de non petendo*, which cannot profit the defender.

THE LORDS found the answer relevant.

Fol. Dic. v. 2. p. 18. Harcarse, (CAUTIONERS.) No 244. p. 58.

See APPENDIX.

PACTUM ILLICITUM.

S E C T. I.

A Son cannot be his Father's Interdictor, nor a Wife her Husband's.

1622. *January 18.* . L. SILVERTONHILL *against* His FATHER.

No 1.

A son cannot
be his father's
interdictor.

THE young Laird of Silvertonhill gave in this day a supplication to the Lords, craving inhibition against his father, upon this ground, viz. There was a contract of marriage made betwixt umquhile President Provand and his daughter Elizabeth Baillie, on the one part, and the old Laird of Silvertonhill, and his son, on the other part, for a marriage to have been made betwixt the two young folks; wherein it was appointed that young Silvertonhill, and Elizabeth Baillie, his spouse, should be infest in conjunct-fee, and the bairns procreated betwixt them, heritably in the lands mentioned in the contract, and bearing a clause for interdicting of the foresaid young Laird to his father and good father; and now after the decease of the father-in-law, and of the old Laird Silvertonhill, who were contractors, this young Laird Silvertonhill, who is eldest son and apparent heir, begotten of that marriage, gave in his supplication, craving inhibition against his father, that he should not annailzie any of the lands contained in the contract, wherein he and his wife were appointed to be infest in conjunct-fee, and the bairns heritably, as said is, alleging that clause to be expressly introduced in his favour, and so that he might competently seek inhibition thereupon; which was refused by the Lords to be granted, seeing the parties contractors, who might lawfully seek execution upon the contract, were

No 1. all dead except the supplicant's own father, against whom it was sought, and that the supplicant could not seek it upon that clause.—See PROVISION TO HEIRS AND CHILDREN.

Fol. Dic. v. 2. p. 18. Durie, p. 10.

1663. February 27. Lady MILNTOUN against Laird of MILNTOUN.

No 2.

A wife cannot
be her hus-
band's inter-
dictor.

THE Lady Milntoun pursues the probation of a tenor of a bond granted by Maxwell of Calderwood, her husband, bearing, that in respect of his facility, he might be induced to dispose of his wife's liferent, and thereby redact them both to want and misery; therefore he obliges himself not to dispose thereof without his wife's consent, seeing he had no means but what he got by her: Hereupon she used inhibition, which she now produces as an adminicle, and craves the tenor of the bond to be made up by witnesses. The defender having *alleged*, That there behoved here to be libelled and proven a special *causus omissionis*, because albeit it were proven that such a bond once was, yet unless it were also proven how it was lost, it must be presumed to have been given back to the husband, granter thereof, whereby he is liberated, and this is the course observed in the tenors of all bonds of borrowed money. The pursuer *answered*, That this was not like a bond of borrowed money, the intent whereof is, not to stand as a constant right, but to be a mean to get payment; but this bond, by its tenor, was to stand as a constant right, to preserve the dilapidation of the liferent, and so cannot be presumed to have been quit, by redelivery thereof, albeit it had been in the husband's hands.

THE LORDS, before answer to this dispute, ordained the pursuer to condescend what the effect of this writ would be, if it were made up; for if it have no effect, there were no necessity to make it up.

The pursuer condescended upon the effect thereof thus, that it would be effectual as an interdiction published by the inhibition, to annul and reduce the disposition of the pursuer's liferent, made by her husband, without her consent, in favour of Milntoun, her step-son; *2do*, This bond being accessory to the contract of marriage betwixt the same, and the marriage is *pactum dotale*, and must have the same effect, as if it were included in the contract of marriage, and so is a provision for securing of the pursuer's liferent to herself, and that no deed by her husband, without her own consent, should be effectual. The defender *alleged*, That none of these condescendences could be effectual, not the first because if the aforesaid bond were an interdiction, it would have no effect, unless it were instructed that the granter thereof were *prodigus*, and if it were instructed that he was *rei suæ providus*, it could take away the effect thereof, because an interdiction is nothing else but *constitutio cartitorum prodigo*, where albeit it is done of course *periculo facientis sine causæ cognitione* with us, yet if it be on a false ground and narrative, it is ineffectual; *2dly*, Though it could be

instructed that the husband was *levis*, yet the interdiction is null, being to his own wife, who cannot be his curator, being *sub potestate viri*, nor curator to any other, much less can her husband be made her pupil, contrary to the law, divine and human; neither could the bond be effectual, as a provision adjoined to the contract of marriage, because it being from a husband to his wife, so soon as he was married it returned to himself *jure mariti*, because nothing can consist in the person of the wife which belongs not to the husband *jure mariti*, being moveable, except an aliment formerly constituted to her in a competent measure. The pursuer answered, That she opposed the bond, and further offered to restore to the defender all that he gave for the disposition of her life-rent.

No 2.

THE LORDS, after they had reasoned the several points *in jure*, and found, that, without the offer, the bond could not be consistent as an interdiction, in so far as concerned the husband to annul the disposition, but were inclined to sustain the same for the wife, in so far as might extend to a competent aliment of her family to herself, daughter, and servants, not excluding her husband; yet they found the offer so reasonable to repay the sum paid for the life-rent, being 5000 merks, and the life-rent itself, being eight chalders of victual and eight hundred merks, that they found the effect of the tenor would be to restore either party *hinc inde*, but desired the pursuer to let the defender keep the possession of the house and lands, wherein there were many woods newly cut, he finding caution to pay her eight chalders of victual and eight hundred merks, which his father was obliged to make them worth by the contract of marriage.

Fol. Dic. v. 2. p. 19. Stair, v. 1. p. 189.

S E C T. II.

Pactum contra Libertatem.

1612. March 6.

WEDDERBURN against MONORGUN.

A CONTRACT whereby a man for assythment of slaughter, for the which he was prisoner, binds himself to perpetual banishment, and never to return to the kingdom, nor to seek licence nor warrant for his returning, under a great pecuniary pain, not found lawful to infer contravention and payment of the sum, because the King's privilege cannot do that without the King's consent, especially he, as being convicted of a capital crime. It was remembered, That the

No 3.

Paction of perpetual banishment, in lieu of assythment for slaughter, was found unlawful without the King's consent.

No 3.

Laird of Drum and my Lord Forbes obtained the King and Council's consent to their contract of banishment of John Forbes of Cossundie, and his accomplices, and that the decreet-arbitral betwixt the Arthours and Walleis, for banishment of the Walleis, was not sustained till it was ratified by the King.

Fol. Dic. v. 2. p. 19. Haddington, MS. No 2427.

No 4.

1632. *March 24.* LAIRD OF CAPRINGTON *against* GEDDEW.

ONE Geddeu a collier, gives his bond to the Laird of Caprington, to serve and work at his coal-heughs during all the days of his lifetime. Notwithstanding, he leaves the Laird, and enters in service with the Laird of Craigie-Wallace. Caprington pursues the collier upon his bond. It was *alleged*, that the bond was made *contra bonos mores*, and christian liberty, and of the nature of a bond of man rent. The LORDS repelled the allegiance.

Fol. Dic. v. 2. p. 19. Auchinleck, MS. p. 17.

* * * Durie reports this case :

Is a pursuit against Geddeu, for payment of certain sums, for being absent from Caprington's work, at his coal-heugh, contrary to the tenor of Geddeu's bond, whereby he had obliged him to work at Caprington's coal-heugh during all the days of his lifetime ; and the Laird of Craigie-Wallace, who was master to Geddeu compearing to defend him ; *alleged*, that this bond was null, and ought not to be sustained in any christian nation, seeing it was against good manners, and christian liberty, to take any person perpetually bound to a perpetual and miserable servitude, and also against the acts of Parliament, which prohibit all leagues and bonds among the subjects, as the 43d act 6th. Parl. Queen Mary, and 12th act 10th Parl. James VI. For it is against all equity and natural liberty, to take the free liege of his Majesty obliged to perpetual servitude. This allegiance was repelled, and the bond found lawful and sustained.

Act. — *& Gilmor.*

Alt. —

Clerk, *Gibson.*

Durie, p. 632.

1728. *December*

No 5.

ALLAN and MEARNs *against* SKENE of Skene, and BURNET of Monboddoo.

THE tacksmen of the fishing boats belonging to the village of Johnshaven, entered into a contract with the masters and crews of several of these boats, by which they became bound for the space of three nineteen years, to pay to

the tacksmen forty four potinds Scots for each boat yearly; that during this time they were to be as *adscriptitii* or *villani* astricted continually to their respective boats, so that not one of them, during all that time, could remove from the village of Johnshaven, or so much as from one boat to another. Two of the above fishers being under age when they signed the contract, raised a reduction thereof, upon minority and lesion. The defence was, that there was no lesion, fishing being the pursuer's trade, and which, should they be loosed from this contract, they could follow under some other master, or in some other place. This contract was notwithstanding reduced, as being too great a restraint upon natural liberty.—See APPENDIX.

Fol. Dic. v. 2. p. 19.

No 5.

1735. January 15. STALKER against CARMICHAEL.

No 6.

CARMICHAEL and Stalker entered into a co-partnery of bookselling within the city of Glasgow, to continue for three years; and because the place was judged too narrow for two booksellers at a time, it was stipulated, 'that after the expiry of three years, either of them refusing to enter into a new contract upon the former terms, should be debarred from any concern in bookselling within the city of Glasgow.' In a reduction of the contract, the LORDS found, the debarring clause in the contract is a lawful paction, and not contrary to the liberty of the subject.—See APPENDIX.

Fol. Dic. v. 2. p. 19.

SECT. III.

Parents, Tutors, &c. taking money under the name of a Gratification.

1622. July 30. CARNOUSSIE against AUCHANACHIE.

No 7.

In a suspension raised by Carnoussie, the LORDS found a bond of five hundred merks unlawful, which Auchanachie had taken from Carnoussie for his furtherance of the block of Pittindreich, pertaining to Auchanachie's sister's son, who was interdicted to him; because an interdictor should take no profit for any block of land pertaining to the man interdicted to him. And albeit the bond did bear borrowed money, yet Auchanachie was made to swear the

No 7. true cause, which being confessed as said is, the letters were suspended *simpliciter*.

Fol. Dic. v. 2. p. 20. Haddington, MS. No 2664.

No 8.

1624. July 24.

ROSSIE against Her CURATORS.

SUSPENSION of a registered bond of 200 merks of principal, and L. 40 of expenses: *Ratio*, no money received, nor good deed, and the man suspender who is cautioner, and the woman is principal, being to marry together, as now they are married, the charger, at the least his father to whose behoof the bond was made, being curator to the woman, would not deliver the woman's evidents till he got this bond, which was no just cause of the bond, and so the bond is given *ob instrumenta deposita reddenda*, which is a shameful cause; and refers this to their oaths, father and son.

Find the reason relevant, and grant letters to warn them to give their oaths.

Clerk, *Duric.*

Fol. Dic. v. 2. p. 20. Nicolson, MS. No 560. p. 387.

No 9.

A tutor in law having by the advice of friends, granted a factory to the pupil's mother, who on that account gave him a bond for a considerable sum, the Lords found this an unlawful transaction; for a tutor, though he may grant a factory, ought to make no profit to himself upon any engagements he enters into for behoof of the pupil.

1639. February 27.

MUSHET against DOG.

ONE Mushet being served tutor lawful to his brother's bairns, transacts with Elizabeth Dog, mother to the bairns, and she obtains a factory from him, for which she by the meditation of some friends, obliges her by bond to pay him 3000 merks, which the said friends appointed her to pay; upon the which bond she being charged, suspends, that it was given *ob turpem causam*, viz. for selling of his office of tutor, or for granting of a factory, which is equivalent, the factory being made for sums paid therefor, and which must tend to the prejudice of the bairns, and therefore such pactions ought not to be allowed in judgment, but are reprobate in law; and although the consent of friends was obtained to the said paction, yet that ought not to give warrant to a paction not warrantable in law; especially seeing *rebus integris* the suspender renounces the factory, and is content to repone the charger to the same, and to his own administration. And the charger *answering*, that it is not now time to offer to repone, after so long a time, there being more than two years and a half, since the date of his tutor, and where this bond proceeds upon decret arbitral, done by friends, mutually chosen betwixt the parties, and being done by a woman, who then was *major sciens prudens præsens et volens*, and upon her own earnest dealing, there neither being violence nor fraud used against her for doing thereof; for albeit the office of tutor may not be sold, yet there is no reason nor law, which prohibits a tutor to make a factory, and to transact

with the factor for the same; and therefore he *alleged*, That the reason was not relevant. THE LORDS found, that this transaction ought not to be sustained in law, being of the nature of *turpia pacta*, which are reprobated in law, and whereby such pactions are declared to be invalid, to produce any action upon the same; and although the condition of the paction was made, not for selling the office of tutory, but for constituting of the mother of the bairns to be factrix in the office, and that it was also done by the advice of the bairns' friends, yet it was found to be unallowable in law, seeing it was granted for so great a sum, viz. 3000 merks, which behoved to come off the pupil's estate, and consequently behoved to be to their prejudice, and so ought the be rejected; for the LORDS found, that although a tutor might make a factor, yet to constitute one for such a lucrative cause to himself could not be sustained; for it were more to be sustained in law, for the tutor to give reasonable allowance to a factor, for satisfaction of his pains, and as the same should merit, than to sell a factory, which evidently tends to the pupil's lesion; therefore the letters and charges upon that bond were suspended *simpliciter*, it being confessed, that the bond was given for that cause.

Act. Primrose.

Alt. Dunlop.

Clerk, Hay.

Fol. Dic. v. 2: p. 19. Durie, p. 378.

1680. June 23.

HAMILTON against BORTHWICK.

HAMILTON of Balderston having charged Francis Borthwick upon his bond of 3,500 merks, he suspends on this reason, that the bond was procured *contra bonos mores*, and so is null; for though it bear borrowed money, yet there is a back-bond produced, bearing, that the true cause was for expenses wared out for her, ——— Brown, by the mother, for the charger her husband; and that if the marriage then intended between her and the suspender took not effect, then the suspender should be free; which being five months before the contract of marriage, shows clearly, that the bond was granted to promote the marriage, and to overvalue the expenses, where indeed none is due, the mother in her widowity being obliged to entertain her daughter in bed and board *gratis*, and the suspender since her marriage hath paid her cloths to merchants; and so it was a most unwarrantable deed by a step-father, upon an unjust pretence, to make merchandise of his step daughter. The charger *answered*, That albeit the backbond had been inserted in this bond, acknowledging the expenses to have amounted to 3,500 merks, it did sufficiently instruct the same, and liberated the charger, all exceptions being renounced by one who was *major sciens et prudens*, who hath gotten above L. 1000 Sterling with his wife; and therefore, though her mother had been obliged to entertain her freely, he might in gratitude and remuneration have given this sum; *2do*, The law allows

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No 9.

No 10.

Turpis causa being alleged against a bond granted by a person in suit of a woman to her mother "for expenses laid out upon her daughter," was sustained only in so far, as evidence of expenses could be given.

No 10. gratifications *provenetis* for interposing and promoting of marriage, which is very lawful. It was *replied*, That it is never lawful to the parent, tutor, curator, or the step-father, who is in place of a parent, and who are obliged to be for the woman, to do any thing for any other deserving gratification, otherwise on this pretence, mothers and their husbands, and tutors and curators, would be encouraged to betray their trust, and for gratifications prefer undeserving persons.

THE LORDS would not sustain this bond alone without an astruction of equivalent expense, but would not put the charger to astruct it by probation, but ordained him to condescend on the expenses, and to adduce such evidence as he could, and ordained the mother's bond to be produced, reserving to the LORDS what the probation should operate, as to the modification of the expenses.

Fol. Dic. v. 2. p. 20. Stair, v. 2. p. 774.

1696. July 3.

JOHNSTON against MURRAY.

No 11.

Objected to a bond, that it was granted by a husband for obtaining the grantees' consent to his marriage. The bond was sustained.

This bond was signed between the date of the contract and the solemnization of the marriage.

HALCRAIG reported, Johnston of Newton against George Murray of Murriewhat, being a pursuit on a 400 merk bond, granted by the charger's sister, Murriewhat's wife, to him; and the grounds whereon he contended the husband was liable for it, were these, that though it was granted by a wife, *stante matrimonio*, yet it was written by the husband, and he was one of the two subscribing witnesses in it, and had paid annualrent for it. *Answered*, Whatever he did to please his wife, yet it was plain, that a bond granted by a wife *res-tita viro*, was *ipso jure* null; and *esto* that the husband's being writer and witness therein, imported both his knowledge and consent, yet that no ways validates the deed in law; for a bond granted by a wife with her husband's consent is no more obligatory either on her or her husband, than without it. It is true, if it be in relation to heritage, she may so bind herself, but not *quoad* sums of money. THE LORDS considered what could be the meaning and import of such a bond, which behoved to be either simplicity or design; and therefore to expiscate, if there was any fraud, they ordained the pursuer to condescend on the onerous cause of the bond, to the effect they might consider, if there were ground to examine the other witnesses, and communers present; and if it was asserted, That her bond was as good as his own, if he wrote it, &c. then the LORDS inclined to find the husband liable.

There was a second debt, for which he was pursued, viz. a 500 merk bond, taken by him from the husband, at the time of the marriage, which was *alleged* to be for obtaining his consent thereto; which is a dishonest and unlawful gratification, being dated betwixt the signing the contract and solemnization of the marriage; and which has been reprobated by the LORDS by several deci-

sions, as 20th July 1664, Laird of Clerkington against Stuart, *voce* SUCCESSION; and 23d June 1680, Hamilton *contra* Borthwick, No 10, *supra*. *Answered*, He opposed the bond granted by him when *major sciens et prudens*, and whatever the wife and children might quarrel the same as *contra pacta dotalia et fidem tabularum nuptialium*; yet it was always good against the granter and subscriber; as was found, within these two years, betwixt Hamilton of Hill, and Hamilton of Raplock. THE LORDS sustained the bond against the husband who granted it.

No 11.

Fol. Dic. v. 2. p. 20. Fountainhall, v. 1. p. 725.

S E C T. IV.

Gratuity taken from a Debtor.—Taking gratification to become Cautitioner.—Bond granted by a Criminal on condition of the Creditor using his interest to obtain the Granter a pardon.—Bill granted to Magistrates by a Prisoner.—*Respondentia* Bond confirmed by Collateral Securities.

1677. *January 2.* NISBET *against* The LAIRD of Humbie,

SIR PATRICK NISBET having charged the Laird of Humbie for payment of some bonds, he suspends, and alleges payment, by delivery of certain goods to the charger, especially two coach-horses, and horse-corn; which being referred to his oath, he deponed that he received the horse-corn, but that it was gifted to him; but as to the coach-horses, his oath was not clear, and he was appointed to be examined at the advising of the oath. This question occurred to the LORDS, Whether a creditor might take any gift from his debtor, except it were in remuneration, or for some special favour or beneficence distinct from the debt.

THE LORDS found he could not, or otherwise there could be no guard against usury, if the creditor might take any thing, either for the delay of the principal sum, or of the annualrent; otherwise the law for six of the hundred might be totally elided; for indigent debtors not being able to make present payment, would in like terms gift things upon consideration the creditor may give delay by way of favour, though not by way of contract, and so might get double annual, so long as the debtor was not able to pay; and they did remember that they had lately done the like in the case of a creditor, who had gotten

No 12.

A donation from the debtor to the creditor, will be imputed towards payment.

No 12.

yearly two stone of cheese, and deponed that it was by way of gift, yet the LORDS allowed the same in part of payment of his annualrent.

Fol. Dic. v. 2. p. 20. Stair, v. 2. p. 484.

1696. June 3.

SUTHERLAND against SINCLAIR.

No 13.

An assignation to a tack was reduced, being granted of the same date with a bond of borrowed money, and acknowledged to have no other onerous cause.

In the concluded cause, Sutherland of Eusdale against Sinclair of Dumbeth, a debate arose in the advising of an oath, whether a tack was not the onerous cause of the bond charged for, and he having deponed it was not, but given him gratuitously over and above, the LORDS thought this looked very like an usurious paction, seeing it has been found, that the accepting of some stones of cheese, above the ordinary annualrent, to continue the sum, implied usury; and though men were not restrained from gifting, yet, at the time of such bargainings, it did not seem to be a free gift. Yet, there being no process of usury depending, the LORDS decerned, reserving the pursuit upon the usury, which they recommended to the advocate present to insist in. Some contended, it might be taken in summarily, by way of exception, seeing the acts of Parliament allow the debtor the half of it, in case he be the first revealer, and make it receivable summarily, by way of exception.

June 20.—THE LORDS having of new heard the parties, in the case mentioned 3d current, between Sutherland and Sinclair, they found the allegiance of an usurious paction might be summarily received *quoad civilem effectum*; and shunned to brand the assignation to the tack as direct usury; yet they reduced it as null, being of the same date with the bond for borrowed money, and acknowledged in his oath to have had no other onerous cause but a gratuity, to make a good understanding between them as to other differences; but in regard he deponed, it was agreed to betwixt them, before any mention was made of borrowing the money, the LORDS looked on this as an extrinsic quality, and only *palliated usura*, therefore did not regard it, unless they subsumed on some obligation in writ, by which he might have been compelled to perform it. And the LORDS have been very severe on this point, 2d January 1677, Sir Patrick Nisbet against Humble, *supra*, where they would not so much as allow creditors to take gifts from their debtors, else this crime of usury might be under such pretences easily evacuated and eluded.

Fol. Dic. v. 2. p. 20. Fountainball, v. 1. p. 717. & 722.

1711. January 24.

WILLIAM KING in Auchindenan, against JOHN KER in Auchinboth.

No 14.

A cautioner took bond from the principal debtor for a sum of money, as a reward for becoming cautioner for him. This found to be *contra bonos mores*, and the bond reduced.

WILLIAM KING having charged John Ker upon a bond for L. 100, with annual rent and penalty, granted by him to the charger, as a premium for the hazard of his becoming cautioner for the granter for the sum of 800 merks, then borrowed from John Simpson at Beithkirk; he suspended upon these grounds, *imo*, The bond is an unlawful usurious paction, in so far as, usury is not only the stipulating or exacting more interest than law allows, but also the taking directly, or indirectly, more profit for the loan of money than the ordinary interest. V. G. It would be usury, in the construction of law, to take from a necessitous debtor a bond for L. 100 for the loan of 800 merks, though the ordinary interest be pactioned for the sum borrowed; and what is usury in the creditor, obtains against the cautioner; for Simpson having lent the money upon the faith of the cautioner, it must be understood to be lent to him, and *traditione brevis manus*, lent by the cautioner to the suspender, so that the cautioner was in effect creditor, besides, that he was creditor by the clause of relief. The case is the same, as if he had pactioned that, in the event of his paying the debt, the suspender should be obliged to give him the interest of 10 per cent. for it, or a liquid sum over and above his relief. Now, if law would reprobate such pactions in the event of payment, much more doth it disallow such a paction as this upon the hazard of payment, for *qui dicit majus dicit minus*. The law for restraining usury would be easily eluded, if cautioners be suffered to take what the principal creditors cannot, which were to allow the thing, changing the persons; and a covetous grasping creditor, under pretence of being a cautioner, might borrow his money from a feigned or pretended hand, and exact from the debtor at his pleasure.

Replied for the charger, Usury can only be where a creditor takes more than the legal interest from the debtor; and though the cautioner be creditor *quoad* the obligation of relief, he is not creditor *sortis*, but bound jointly and severally with the suspender for it. The bond charged on being given as *præmium periculi*, that the charger, as cautioner, run of paying the debt, became due to him whether he paid the debt or not, as in the present case he did not. Besides, penal laws, which are *stricti juris*, cannot be extended *de casu in casum*. It is no new thing to observe acts, the same upon the matter, to have different effects in law. V. G. A creditor lending money *filio familias*, could not recover the same, *quia obstat exceptio senatusconsulti Macedoniani*; but that exception did not hinder repetition to him, who lent *filio familias* any other fungible. And it were hard to allow rewards to third persons, simply for procuring the loan of money, and deny the like to cautioners, who run great hazard by lending their credit. Nor will it follow, that creditors may as well take such *præmia* for the hazard they run of losing their money lent, because these are doing their own business in managing an ordinary trade, for which

No 14. law hath determined a reasonable profit; whereas cautioners interposing in another's affair, have no gain to expect, but are in danger of much loss. And there can be no danger of eluding the good laws against usury; because, if the suspender can allege, that the money borrowed was truly the cautioner's, and that the creditor's name was only borrowed to disguise the matter, the charger will find this relevant to infer the pain of usury against him.

Duplied for the suspender, Though this bond not being founded in the precise letter of the laws against usury, can have no penal consequence; yet it may, as *turpe factum*, and unlawful extortion, from the common principles of equity, and the parity of reason in the law discharging usury, be annulled, *L. 13. D. De Legibus, L. 11. D. De Præscript. Verb. L. 7. § 2. D. De Jurisdict. 2do*, It is only allowable to take *pretium periculi*, where the hazard doth not arise from the uncertainty of re-payment through the debtor's insolvency, but from some extrinsic hazard, as *in nautico Fœnore, L. 5. D. De nautico Fœnere.—3tio*, This new devised invention to impose upon the necessity of straitened debtors, ought to be checked in the bud; seeing cautionry is not the subject of commerce, but a friendly office, which law hath taken care to secure, by a full relief of all damages in the event of distress, and to ask more, is plain extortion.

Triplied for the charger, Bonds of this kind are so far from any turpitude, that they were frequent among the old Romans, who never authorised any deed *contra bonos mores*. For their law doth reckon that only to be *turpis et injusta causa*, when any thing is taken for the doing or not doing what one is obliged to by law, *L. 2. D. De Condict. ob turpem causam*; and this bond falls under neither of these heads, but is one of those innominate contracts *do ut facias*, or *facio ut des*, or *mandatum*, all which may admit of a reward, *L. 19. § 1. D. De Donat. L. 6. Pr. D. Mandati*. So Gothofred, upon these laws, observes, That *fide jubendi causa pecuniam accipere possumus*. And a woman getting money for her becoming cautioner, was liable as other cautioners, because thereby a gainer, *L. 23. C. Ad Senatusconsult. Velleian*; which argues, that it was allowed to take money for becoming cautioner. Again, as this paction being so warranted by the civil law, and hitherto condemned by no statute or decision, the charger was *in bona fide* to make it.

THE LORDS were clear, That the charger was not guilty of usury; but found, That his taking the L. 100 from John Ker, as premium for becoming cautioner for him, was *contra bonos mores*, and therefore annulled the bond.

Fol. Dic. v. 2. p. 70. Forbes, p. 484.

* * * Fountainhall reports this case :

1711. January 27,—JOHN KER, weaver in Beath, having occasion to borrow 800 merks from one Simpson, who refused to lend it, unless he gave him a suf-

ficient cautioner, Ker applied to William King, who agreed to bind with him ; but in respect of the trouble, risk and hazard, he took a bond from Ker for L. 100 Scots, bearing annualrent and penalty, as a reward and encouragement for his engaging and interposing his credit to procure him the money. Ker at the term of payment satisfies Simpson, the creditor, and retires the bond with a discharge, and shews it to King the cautioner ; but he charges Ker on his L. 100 bond, who suspends on this reason, that the paction was plainly usurious, contrary to the act 222d, 1594, and act 251st, 1597 ; and it does not alter the case, that this is not betwixt the debtor and the creditor, but is a paction betwixt the principal debtor and his cautioner engaging for him ; for, as it would have been usury in Simpson, the creditor, to have taken bond for his 800 merks he lent, bearing the ordinary legal annualrent, and then taken a bond apart for L. 100 Scots for his gratifying him in lending it, this second bond in the construction of law would be certain usury ; it is the same thing if the cautioner exact the same gratification from the necessitous debtor for whom he binds, the design of these excellent laws prohibiting usury being to pull poor debtors out of the claws of such cormorant harpies, and to secure them, that it shall not be in their power to injure themselves by borrowing money at exorbitant rates. What if a cautioner take a bond from the debtor, that if he be forced to pay the debt, he shall reimburse him with interest at 10 per cent ? And though usury be properly committed in *mutuo* and loan of money, yet it extends to fidejussion, which is but an accessory ; and the laws being made to repress grasping usurers and extortioners, it is all one to me whether I be oppressed by my debtor or my cautioner. *Answered*, There is no law making this case usury ; and it being penal, cannot be extend *de casu in casum*. And there is nothing more ordinary than to give brokers a gratuity to find out money to borrow ; and it is a trade by which some live, and has never been condemned ; and *per l. 5. C. De naut. fenore*, money may be given to a fisher, to be repaid if he have a good take, or to a wrestler or runner if he gain the prize. And it cannot be judged unlawful to paction a *premium periculi*, when I ran the hazard of paying the money. THE LORDS considered, that many devices had been invented of late to evacuate these good laws ; for some time usurers crave a consideration from indigent debtors for their pains in seeking the money, and in the mean time the money is their own, though they take the security in another man's name ; 2do, They, in cases of necessity, take a bond for L. 100 when they only advance L. 90 ; 3tio, They bargain to get bond for L. 50, when they do not pay it all in money, but give a horse or a ring in part of it, estimated at L. 10 or L. 12, when they are not truly worth L. 5. Therefore the LORDS, in this particular case, would not find it direct usury, to infer the penal effects, but that it was *turpe lucrum, et pactum contra bonos mores*, and declared the bond null, and assoilzied from it.

Fountainball, v. 2. p. 631.

1737. June 24.

-JAMES BROWN of Carsluith *against* ISABEL MUIR and her Husband.

No 15.

A bond for borrowed money, in which the debtor bound himself, that, in case he at any time sold his lands, he should dispose the same at an agreed price to the creditor and to no other, was found, in so far as concerned the sale *contra bonos mores*, and therefore not binding.

THE deceased Robert Brown of Carsluith, with consent of the said James his son, granted an obligation to the also deceased John Muir of Craig, bearing, in the narrative, That he having advanced the sum of 16,000 merks for relieving them of certain debts, upon the express condition, That, in case they should at any time thereafter have occasion to sell the lands of Kirkmabrecks, &c. then they should dispose the same to him and to no other; after which follows the obligatory clause, 'Whereby they bind and oblige themselves, their heirs, &c. That, in case at any time they had occasion to sell the said lands, they should dispose the same to him and his heirs (secluding assignees) and to no other person whatsoever, he always paying 17,000 merks, as the agreed price thereof, whereof the said 16,000 merks to be in part, in case it was not paid before the time of such sale.'

Of this deed James raised a reduction after his father's death, as being an usurious and unlawful bargain adjected to a loan of money; in which this separate question occurred, How far the obligation to sell, being indefinite as to time, can have a perpetual endurance?

For the pursuer it was *argued*; That by the express tenor of the clause, the obligation was perpetual; seeing the obligants had bound themselves, &c. That, if they had occasion to sell the lands; they should dispose of them to the said John Muir; which was surely an unlawful paction, as it resolved in an interdiction not authorised or known in law. Besides, it is contrary to the common liberty of mankind, that one should astrict himself with respect to selling his estate to a particular person or family; for, while one remains proprietor, it would seem inconsistent with the nature of the property, that he should lie under such an embargo. It is true, there are instances in law where such pactions are sustained; thus, in *L. 75. D. De contrahen. empt.* a paction adjected to a sale, That, if the purchaser shall have occasion to sell the thing again, he shall dispose of it to no other than the first seller, is valid. Such is the case likewise where any person has the privilege of pre-emption, as the superior in emphetutical rights; but in these, and many others that might be mentioned, the party who is preferable, behoved to give the current or market price for it, and not pretend to take it for a sum covenanted at the time of the bargain; seeing, from the nature of such a paction, the subject may not be disposed of for many years; so that a remote heir, when he comes to sell it, may not draw the tenth part of the value; as the prices of things vary every day, which is really the present case; as the value of these lands is now far greater than the sum agreed on.

For the defenders it was *observed*; That the narrative of the obligation seems to point as if it had not been intended to be perpetual; seeing it sets forth,

That in case 'we, or either of us, have occasion to sell the lands,' &c. which are words that can only apply to the two obligants. Nor is it any objection to this construction, That, in the obligatory part, they not only bind themselves, but their heirs; for, although a man oblige himself to do any thing in his own life, yet, notwithstanding thereof, he usually binds himself and his heirs that he shall do so; the consequence thereof is, That, if he contravene, the heir will be liable in damages, and obliged to procure to be undone what his predecessor did. Now, to apply this to the case in hand, if the obligants here had sold the land to another, and then died, the heir would be bound to make good the damage, and to procure the same to be undone; but, granting that it was perpetual, there is no force in the objection; seeing there is nothing inconsistent with the liberty of mankind, that one should lie under a perpetual obligation not to sell but in favour of one family, such being the import of every clause of redemption; and, if a man can lawfully bind himself, Why cannot he, in the same way, bind his heirs? Nay, there does not seem any thing to stand in the way of a man's obliging himself and his heirs not to sell at all, which is truly the case of entails; as it is the natural consequence of property, that every person may subject it to what conditions and limitations he pleases.

As to the distinction, That such bargains are not valid if the price is fixed at the beginning, it is without any foundation or authority whatever; if indeed the right of pre-emption arises from law and not by paction, then no price can be fixed; and, of consequence, the current price, at the time of sale, must be the rule. But it would prove a strange restraint upon property, if a person who intended to secure himself a certain price in the event of an eventual sale, should not have it in his power to do it. Nor is it to the purpose to mention the chance of lands rising in value; as the hazard of its falling lies on the side of the buyer.

THE LORDS found the obligation was no longer binding than during the life of Carsluith and his son, the obligants.

But, upon petition and answers, founded on the objection, That the contract of sale was unlawful, by being adjected to a loan of money,

THE LORDS found the contract, in so far as concerned the sale, *contra bonos mores*; and therefore not binding.

C. Home, No 29. p. 54.

1752. June 3.

ARCHIBALD STEWART, Clerk to the Signet, *against* ALEXANDER, Earl of GALLOWAY.

No 16.

SIR JAMES STEWART of Burray, being pursued criminally before the Court of Justiciary, for the murder of Captain James Moodie of Melsetter, and not dar-

A party granted bond for a sum to an officer of

No 16.
court to induce him to procure a pardon for a crime. Found null.

ing to stand trial, was outlawed. Some years after, he appeared in London, and applied to his namesake, James Stewart of Torrence, who enjoyed an office about the King's person, to solicit his pardon; and, the more effectually to engage him, granted him a conditional bond for L. 100 Sterling, to be purified when the pardon should be obtained; and the pardon accordingly was obtained.

This bond was put in suit many years after, by the representatives of the creditor, against the representatives of the debtor, and many defences were stated. But the LORDS refused action, upon this medium, that it was a *turpis causa* to give a premium to any man attending the Court to solicit a pardon.

Fol. Dic. v. 4. p. 29. Sel. Dec. No 9. p. 11.

*** This case is reported in the Faculty Collection.

THE deceased Sir James Stewart of Burray was, in the year 1726, pursued criminally before the Court of Justiciary, for the murder of Captain James Moodie, and fugitated for non-compearance.

Afterwards Sir James came privately to London, and applied to James Stewart of Torrence, to solicit a pardon for him from his Majesty; and, on the 4th September 1730, Sir James executed a bond in the English form, obliging himself in the sum of L. 200 Sterling to James Stewart; and the condition of the bond is, that in case his Majesty should, at any time before the 3d of August next, grant a warrant for passing his most gracious and full pardon to Sir James, of all crimes and misdemeanours, and other offences whatsoever, against the laws of the realm, or any of them, by him heretofore committed; and that, within 20 days after such warrant happens to be granted, Sir James should pay to the said James Stewart, his heirs or assigns, the sum of L. 100 Sterling; then the obligation to be void otherwise to stand in full force.

His Majesty, on the 12th of May 1731, granted warrant for his gracious and free pardon to the said Sir James of the killing of Captain Moodie, and of all accession thereto.

After the death of these parties, Archibald Stewart, as executor to the said James Stewart, brought an action against the Earl of Galloway, as representing the said Sir James, for payment of the sum contained in the said bond.

Pleaded for the Earl, That the condition of the bond never existed; for no full pardon was granted Sir James Stewart of all crimes and misdemeanours, but only a particular one for the murder of Captain Moodie.

Observed on the Bench, That the bond was *contra bonos mores*, as it was a stipulation of a sum of money for obtaining a pardon, which was truly no other than a bribe; and, therefore, no action could lie on the bond.

“THE LORDS found, that, in regard no full pardon was granted to the deceased Sir James Stewart of all crimes and misdemeanours, no action lay for

the sums contained in the bond ; and also found, that no action could lie against the Earl of Galloway upon the bond in question."

No 16.

Act. Ro. Craigie.

Alt. Elliot.

Clerk, Pringle.

B.

Fac. Col. No 9. p. 13.

1784. December 16.

JANET MASON against JOHN HENDERSON.

THE son of John Henderson, an Officer in one of the ships belonging to the East India Company, obtained from Alexander Robertson a loan of L. 100, upon his bond at *respondentia*. Within 30 days after the return of the vessel, he was to pay L. 122, and L. 1 : 2 for every month thereafter. As an additional security, John Henderson likewise became bound, in the same event, to make payment of the monies advanced.

The ship referred to completed the voyage ; but the borrower remained in India : And Janet Mason, the executrix of the original creditor, pursued John Henderson for the debt.

Pleaded in defence, By statute 19th George II. c. 37. it was enacted, ' That all monies lent on bottomry, or at *respondentia*, on vessels to or from the East Indies, shall be expressly lent *only* upon the ship, or upon the merchandise.' The stipulation elicited from the defender, therefore, by which the creditor obtained a collateral and personal security, was altogether illegal and void.

Answered, The extraordinary interest stipulated in contracts of bottomry, and *respondentia* bonds, was only permitted at common law, because compensated by the unusual risk run by the lender. But the addition of collateral securities, entitling the creditor to demand payment, whether the adventure prove successful or not, would totally change the nature of the bargain, and render it a cover for usury and oppressive dealings. And to such agreements alone the statute of the late King was meant to extend.

But it never could be intended to annul obligations such as the present, where nothing is exigible, either from the debtor or his surety, until the arrival of the ship. Here the creditor's purpose is not to secure himself against the hazards of the adventure, but against the insolvency of his debtor, which, after the voyage had been successfully performed, might have disappointed him of his payment. Nothing, accordingly, is more frequent in practice, than stipulations of this sort. Without them, indeed, in case of the borrower's not returning along with the ship, the creditor's claim would be entirely frustrated.

THE LORD ORDINARY over-ruled the defences ; to which judgment the LORDS adhered, after advising a reclaiming petition for John Henderson, with answers for Janet Mason.

Lord Ordinary, Gardenston.

Act. Whyte.

Alt. Mark Pringle.

Clerk, Home.

C.

Fac. Col. No 135. p. 297.

No 17.
Bonds at *respondentia*,
may be
confirmed by
collateral security.

1789. June 18.

JAMES SHOOLBRED, and Others, against WILLIAM OSBORNE.

No 18.

It is illegal in the Magistrates of a Royal Burgh to stipulate an indemnification from prisoners in case of their escape.

A DEBTOR, arrested in virtue of letters of caption, having been presented for incarceration to James Shoolbred, one of the Magistrates of Auchtermuchty, and the jail of that town being quite unfit for the reception of prisoners, it was resolved, for this purpose, to make use of the Court-house, which is immediately above the jail, but not secured, as a prison ought to be, with iron bars, &c.

In order to indemnify the Magistrates, in case of an escape, the prisoner indorsed to them a bill of exchange for L. 42, drawn by him and accepted by William Osborne. For this acceptance Osborne had received no value, it being solely intended to create a fund of credit to the drawer.

Very soon after, the prisoner made his escape.—The Magistrates, in an action at the instance of the incarcerating creditor, were found liable for the debt. And they having sued William Osborne for payment of the bill indorsed to them, he, in defence,

Pleaded, The confinement of a debtor in prison is founded on a presumption, that, by the *squalor carceris*, he may be compelled to pay the sums due by him. To permit his escape is, in the contemplation of law, an injury to the creditor; and whether this has been owing to collusion or neglect, it implies a breach of duty in those who had him in custody. Hence it must be illegal for the Magistrates of a burgh to enlarge a person confined even for a civil cause, on getting any sort of assurance that they shall be relieved from the penal consequences following from it. And an agreement, such as occurred in the present case, whereby the Magistrates obtained a security, in case of the prisoner's escaping, seems to be equally exceptionable. Indeed, when, after a stipulation of this sort, the debtor actually elopes, the one case can hardly be distinguished from the other. Thus the indorsation of the bill here sued on, having been obtained by means to which the law refuses its sanction, it must be considered as ineffectual; and the same defences, which, if the bill had been put in suit by the drawer, would have been good against him, must be equally so against his indorsees.

Answered, When Magistrates are required to put a debtor in prison, they may pay the sums due to the incarcerating creditor, and then set him at liberty. In such a case, too, they may, with propriety, obtain every security that the debtor is able to give for their indemnification. In the same manner, when, from the insufficiency of the jail, there is reason to fear that the debtor may make his escape, the Magistrates may, with equal propriety, take every precaution that is necessary for their own security. So far from injuring the incarcerating creditor, such foresight must, in the end, prove beneficial to him. Where, then, can be discovered the illegality of the transaction here occur-

ring; or what solid reason can be given for maintaining, that the Magistrates, who are unquestionably entitled to sue a person who has escaped from prison, ~~in order~~ to their recovering the sums paid to his creditors, may not, by a previous agreement, voluntarily entered into on his part, provide for their indemnification? Erskine, b. 3. tit. 2. § 31.; Kilkerran, 1st February 1749, Thomson against Colvill, No 190. p. 1632.

“ THE LORD ORDINARY over-ruled the defences.”

After advising a reclaiming petition with answers, one of the Judges seemed to think, that, independently of the alleged illegality of the transaction, the indorsation not being in security of a debt, but of a contingent or eventual claim, could not give the holder the privileges of an onerous indorsee. But the majority of the Court being of opinion, that such an agreement as here occurred, if not absolutely illegal in its own nature, was of an improper tendency, and not to be permitted; it was on this principle that

“ THE LORDS altered the judgment of the Lord Ordinary, and sustained the defences.”

Lord Ordinary, *Dreghorn*.

Act. *Blair*.

Alt. *Cullen*.

Clerk, *Gordon*.

G.

Fol. Dic. v. 4. p. 31. Fac. Col. No. 71. p. 128.

SECT. V.

Bond granted *Causa Adulterii*.

1622. July 20.

DURHAM against BLACKWOOD.

THE LORDS found a bond of 5000 merks given by the Laird of Blackwood to Helenor Durham, daughter to Sir James Durham, and to Weir, daughter procreated in adultery betwixt the pursuer and defender, to be null, by way of exception, as given *ob turpem causam adulterii*.

No 19.

Fol. Dic. v. 2. p. 21. Haddington, MS. No 2654.

. Kerse reports this case.

BOND made by the adulterer to the adultress, and bairns gotten betwixt them; found null *ipso jure*, and ordained to be riven.

Kerse, MS. fol. 46.

*** This case is also reported by Durie.

No 19.

WEIR of Blackwood being married upon a daughter of the Lord Elphinstone. in the time of his marriage begets a bairn upon Helenor Durham, daughter to Sir James Durham, and, after the birth of the bairn, gave a bond to the mother, to provide that bairn to a certain sum; which bond being desired to be registered by the woman against the maker, the LORDS found, that it ought not to be registered, and that it could produce no manner of action, neither in favour nor at the instance of the woman, nor at the instance of the bairn, in whose favour it was conceived; seeing it was a writ given for reward of adultery, albeit that cause was not therein expressed; for it was given to one begotten in an adulterous conjunction, which was not allowable; and, therefore, the LORDS found that it was null, and could not produce action at no person's instance, being given *ob turpem causam*, albeit the cause of the turpitude preceded the giving of the bond; for it was alike, being *præmium adulterii et turpitudinis*.

Act. Stuart & Hamilton.

Alt. Hope.

Clerk, Scot.

Durie, p. 31.

1642. June 25.

ROSS against ROBERTSON.

No 20.
Contrary to
the above.

ONE Mungo Ross having begotten two daughters upon one Cobertson, thereafter gives her a bond, to pay to her 1000 merks at a term; and, failing of her, by decease, before the term, to pay it to their said bairns. The woman being married upon an husband, charges to pay the sum, and the man suspending, that it was given *ob turpem causam*, for the said cause of adultery; the LORDS rejected the reason, and sustained the bond, neither respected they that it was alleged, that the bond was given *ob causam adulterii, tanquam causa turpis fuerit*; seeing it is said in law, *Quod mulier turpiter facit cum sit meretrix, sed cum sit meretrix accipiendo non facit turpiter*; though the suspender answered, That etiam acceptum *ob præmium adulterii auferendum est a muliere*; which was repelled: And the suspender further alleging, That, in respect of the tenor of the bond, providing the sum to the bairns, in case the woman die before the term, therefore, and in respect of the cause itself, in all equity, the woman, who is now married on an husband, ought only to have her liferent use of the sum, and that the fee thereof should pertain to her bairns; this allegation was also repelled, in respect the woman survived the term of payment, and the fee was found to pertain to her.

The Suspende per Lawrie.

Alt. —.

Fol. Dic. v. 2. p. 21. Durie, p. 836.

1707. March 7.

IRVINE *against* SKENE.

No 21.

AN assignation by an adulteress to her adulterous son, was not found null on that score at the instance of the cedent's executor, *qua* nearest of kin, the act 119th, Parliament 1592, relating only to dispositions of heritage.

Fol. Dic. v. 2. p. 21. Forbes.

*** This case is No 19. p. 6350. *voce* IMPLIED CONDITION.

1765. June 26.

SIR WILLIAM HAMILTON of Westport *against* MARY DE GARES, *alias* BONAMY, and MARY BURTON HAMILTON.

SIR JAMES HAMILTON of Westport granted an heritable bond of annuity, for L. 40 Sterling, to Mary de Gares, *alias* Bonamy, of the Island of Guernsey, the wife of John Bonamy, of that island. He granted a like bond for L. 20 *per annum*, to encrease to L. 30, upon the death of her mother, to Mary Burton, *alias* Hamilton, the daughter of Mary de Gares, by Sir James himself, as was supposed.

Upon the death of Sir James, the estate of Westport devolved on his nephew by a sister, William Ferrier, son of John Ferrier, writer in Linlithgow, who assumed the name of Sir William Hamilton.

Actions were brought by Mary de Gares and her daughter, for payment of their annuities; and Sir William insisted in a reduction, upon the ground that the bonds were null, as granted *causa adulterii*; and, therefore, *ob turpem causam*.

Answered for Mary de Gares, There is no evidence of any *turpis causa*; the bond bears to be granted for good and weighty reasons, and onerous considerations. And, allowing it to be true, that Mary de Gares lived in adultery with Sir James, it does not follow, that the bond was granted on that account. It was not given as an inducement to her to leave her husband, for it was granted long after she had left him, and probably with a view of putting an end to the connection. At any rate, the rule of the law is clear, *Turpiter facere quod sit meretrix; non turpiter accipere, cum sit meretrix*; l. 4. § 3. *D. De Conduct. ob turp. caus.* The first violation of her chastity is an act of turpitude; but, after having taken that fatal step, there is no longer any turpitude in her receiving the wages of prostitution, which is now perhaps her only resource.

No 22.

A bond of annuity was granted to a woman living in a state of adultery with the granter, and a similar bond was granted to her daughter, who was supposed to be the daughter of the granter also. The Lords found, that no action lay on the bond granted to the mother, but sustained action on that granted to the daughter.

No 22.

The law is still clearer, in the case of a bond of annuity granted to a woman in that unhappy situation; by placing her in a state of independence, it gives leisure for reflection and repentance, and puts it in her power once more to return to a life of decency and virtue. Instead, therefore, of being reprobated, such obligations ought to be favoured by the law; and, accordingly, a bond of this kind was sustained, 25th June 1642, Ross against Robertson, No 20. p. 9470.; a decision the more remarkable, that it was pronounced at so early a period, when less indulgence was shown to the *delicta carnis* than may be expected now.

Answered for Mary Burton Hamilton, The supposed *turpis causa* cannot apply to her. The presumption is, that she was the daughter of the husband of Mary de Gares: Pater est quem nuptiæ demonstrant. But, supposing her to be the daughter of Sir James, it not only was not unlawful to provide for her, but he was under an obligation to do it. See 7th March 1707, Irving against Skene, No 21. p. 9471.

Replied, It is not denied that Mary de Gares left her husband, and lived in adultery with Sir James. And it will be difficult to assign any other reason for the large provisions which he made to her and her daughter; indeed, the thing is clear from the words of the bond to the daughter, where Sir James gives her his own name, at the same time that he designs her as the daughter of Mary de Gares.

There is no difference between a previous corrupt bargain, and a reward given *ex post facto*; the cause is still the same. And though, where a young woman is seduced and robbed of her virginity, she may perhaps have action for any gift made to her by the seducer, as, indeed, she is entitled to damages at common law; yet, the case of a married woman living in adultery is different, her guilt being at least equal to that of the person with whom she lives.

The quotation from the civil law does not apply, being confined to the case of a common whore, who is such by profession; and, even in that case, it would seem, that, though there is no *condictio* for repetition of what is given to a whore, yet she has no action for payment: In pari casu melior est conditio possidentis. So Perezus lays down the law in his Commentary upon the title of the Code *De Conditione ob turp. caus.* Voet, under that title of the Pandects, *num. ult.* gives a clear opinion that no action lies. And, upon these principles, a bond, similar to that now in question, was found not actionable, either at the instance of the mother or of the child; 20th July 1622, Weir against Durham, No 19. p. 9469.

If this defence would be sustained, in favour of the party himself, because his turpitude is no greater than that of the pursuer, much more must it be available to his heir, who is altogether innocent.

THE LORDS found, " That no action can lie upon the bond granted to Mary de Gares, in respect it was granted *ob turpem causam*; and reduced, assolizied,

decerned, and declared accordingly : But repelled the reasons of reduction and defences against the bond granted to Mary Burton Hamilton ; and decerned."

No 22.

Act. *Ilay Campbell.*Alt. *Lockhart, Creibie.*

G. F.

Fol. Dic. v. 4. p. 26. Fac. Coll. No 11. p. 218.

S E C T. VI.

*Pactum contra Fidem Tabularum Nuptialium.*1577. *January.*TURNBULL *against* HEPBURN.

No 23.

THERE was one Turnbull, a young man, who, by the advice of his friends, and being interdicted; contracted himself in bond of matrimony with a young woman called Hepburn. The young man thereafter being otherways pursued, refused to fulfil the bond of matrimony with the said woman; yet had he before, by reason of his ardent love that he had to the woman, given an acquittance of 400 merks, granted to have received the same, in name of tocher good. He thereafter desired to see his acquittance decerned to have no effect, because non secutum fuit matrimonium, et non secuto matrimonio stipulatio dotis evanescit.—THE LORDS decerned it to be referred to the party's oath, if there was any real enumeration of silver made, otherwise the acquittance to be of no avail.

Fol. Dic. v. 2. p. 22. Colvil, MS. p. 262.

1633. *December.*HEPBURN *against* SETON.

No 24.

SOME part of the things prestable on the bridegroom's father's side, viz. to possess his son in a certain number of chalders of victual, being remitted by the bridegroom himself on the very day of the contract, by a private transaction between his father and him; this was found contra bonos mores et fidem tabulatum nuptialium; and, therefore, declared null.

1634. *January 15.*—BUT the son, long after the marriage, having voluntarily come to his father, and promised to adhere to the former bargain; the
Vol. XXIII.

No 24. LORDS, in regard he prejudged none thereby but himself, and that his promise could not bind his wife, found this relevant to be proved by his oath.

Fol. Dic. v. 2. p. 21. Spottiswood.

* * This case is No 71. p. 8959. *voce* MINOR.

1665. *June 30.*

KENNEDY *against* AGNEW.

No 25.

The Lords refused to reduce a bond granted by a son, without the knowledge of his father, to his father-in-law, for diminution of the tocher, because the sum was small and the lesion inconsiderable.

ANDREW AGNEW, Younger of Lochnaw, granted a bond for L. 1000 to Thomas Hay of Park, his father-in-law, which being assigned to Thomas Kennedy of Kirkhill, he charges young Lochnaw; who suspends, and intents reduction, with concurrence of Sir Andrew Agnew, his father, upon this reason; that the said Andrew having married Park's daughter, Sir Andrew did provide his son and her to a competent provision, and the heirs of the marriage also, for which, in name of tocher, Park was obliged to pay Sir Andrew L. 10,000, this being a solemn contract of marriage, Park did most fraudulently, *contra bonos mores*, without the privacy or consent of Sir Andrew, procure this bond from his son-in-law, the time of the contract, there being nothing treated thereof betwixt the parents. It was *answered*, That the reason is noways relevant; because, Park having given a considerable tocher with his daughter, for which the provision was made by Sir Andrew to his son, it was lawful for Park to take a bond for so small a sum, being only the tenth of the tocher, and which was only payable after his wife's death, wherein no circumvention was used, nor enorm lesion to the granter.

THE LORDS, in respect of the meanness of the sum and small lesion, assoilied.

Fol. Dic. v. 2. p. 22. Gilmour, No 153. p. 109.

* * Stair reports this case.

1665. *July 27.*—KENNEDY of Kirkhill, as assignee by Thomas Hay of Park, to a bond of L. 1000, granted by Andrew Agnew, Younger of Lochnaw, charges him thereupon, who suspends, and raises reduction on this reason, that the bond was granted at the time of his contract of marriage, clandestinely, without the knowledge of his father, who was contractor, *contra pacta dotalia*, et *contra bonos mores*. The defender *answered*, That he having given a very great tocher, *viz.* L. 10,000, above his estate, which is all paid to his good-son's father, he did declare, that he was not able to give so much, and thereupon he got this bond, not to have execution till after his death, which he might lawfully do, having given a tocher suitable to the condition of the receiver, and above the condition of the giver.

THE LORDS repelled the reason, in respect of the answer.
This was thereafter stopped, to be further heard.

No 25.

Stair, v. 1. p. 302.

1668. July 21.

PATON against PATON.

PATON, in his son's contract of marriage, disposes to him his estate, and the tocher was payable to the father. After the contract, and before the marriage, the father takes a bond of 2800 merks from his son. The wife and her brother pursue a reduction of this bond, as fraudulent, et contra bonos mores, et contra pacta dotalia. It was *alleged* for the father, That he might very lawfully take a bond from his son, for provision of his children after the contract, and before the marriage, having infest his son in his whole estate, which was worth 1000 merks yearly, and getting but 2500 merks of tocher, and having some debt, and many children. It was *answered*, That the estate was not worth 600 merks of rent, and the father's liferent of 400 merks reserved; so that the annualrent of this bond would exhaust the remainder, and they would have nothing to live upon.

THE LORDS having considered the contract and allegiances, thought that it was not sufficient to annul the bond, that it was after the contract, and before the marriage, if there was any reasonable cause; therefore, and before answer, ordained the communers at the marriage to be examined, whether it was communed and agreed, that the tocher should be accepted for satisfaction of the debt and bairns portions; and they having deponed *affirmative*,

THE LORDS reduced the bond, as contrary to the communing at the contract of marriage, the estate being very mean.

Fol. Dic. v. 2. p. 21. Stair, v. 1. p. 555.

1680. January 23.

HOME against HOMES.

IN a contract of marriage, the wife having a power, in case of no heirs of the marriage, to make her tocher return to what person she should appoint; and she having named her husband, this nomination was sustained, though done after the contract, and before solemnization; because, this was not impinging upon the contract, but only exercising a faculty given by the contract.

No 27.

Fol. Dic. v. 2. p. 23. Stair.

* * * This case is No 304. p. 6093. *voc.* HUSBAND AND WIFE.

No 28.

An eldest son, to whom a father, in his contract of marriage, had become bound to make over the substance of his effects, granted a private deed, before solemnization, enabling his father to burden the property with provisions to younger children. The deed reduced.

1700. June 21.

-ELIZABETH WALKER against DAVID WALKER.

My Lord Crocerig reported Elizabeth Walker against David Walker, her nephew. Mr George Walker, Clerk to the Régality at Dunfermline, disposes, in his eldest son Thomas's contract of marriage with Elizabeth Beton, some tenements and acres of land, with absolute warrandice; but, at the same time, he takes a private back-bond from his son, whereby he consents that his father shall burden the lands disposed to him with L. 1000, for a tocher to his sister Elizabeth. Mr George and his son being now dead, and Elizabeth pursuing David, her brother's son, as heir to his father, for payment of that sum, at least to have his tenements declared liable and affected therewith; he raises a reduction thereof *ex capite doli*, and on the act of Parliament 1621, and as a private clandestine deed, expressly contrary to the solemn paction and agreement in his father's contract, and that the LORDS have oft annulled such bonds, as fraudulent, *et contra fidem tabularum nuptialium*; and, particularly, 16th July 1672, Duff *contra* Fowler, *voce* PERSONAL and REAL; and Sir George M'Kenzie's Observations on the act 1621. *Answered*, The father having settled his whole estate on his eldest son, it was but reasonable that he should secure his sister in a small and moderate tocher; and seeing the boy is served heir to his father, he can no more quarrel it than his father could have done. THE LORDS thought such voluntary and gratuitous deeds, granted in manifest derogation and prejudice of the solemn *pacta dotalia*, (which are *maximæ et uberrimæ fidei*.) are most unfavourable, and can never subsist against the relict, to exclude her life-rent; so if he be served heir of line to his father, he cannot come against his deed; but if he be only served heir of provision, or heir of the marriage, he, as a creditor, can quarrel and impugn the same; and referred to the Reporter to try the matter of fact, or, if he was yet minor, in which case, he might revoke and reduce his service and retour as heir general.

Fol. Dic. v. 2. p. 21. Fountainhall, v. 2. p. 98.

* * Dalrymple reports this case.

1701. June 27.—MR GEORGE WALKER disposes to Thomas Walker, his son, and Elizabeth Beaton, then his future spouse, and to the heirs of the marriage, a tenement in Dunfermline, and ten acres of ground; and Thomas is bound to infest his future spouse in life-rent, and the bairns in fee, in a tenement belonging to himself, worth 4000 merks, and provides the conquest during the marriage in the same manner.

During the communing, and two days before signing the contract of marriage, Thomas grants a bond to his father, narrating the terms of the contract, and that, seeing his father might be necessitated to contract debt for providing

his children, or otherwise, therefore, he obliged him, either to become cautioner for the sum of 1000 merks, or that it should be in the father's power to burden the said acres therewith.

The father assigned this obligation to Katharine Walker, his daughter, for her provision, who thereupon pursues David Walker, as representing Thomas the granter, for payment of 1000 merks, with annualrents, at least declaring, that the said acres or conquest, during the marriage, are liable to be affected for payment thereof.

It was *alleged*, That the bond being granted during the communing, and contrary to the terms of the contract, was reducible, as in *fraudem tabularum nuptialium*.

The pursuer *answered*, The defender was heir of line served and retoured to his father, and could not quarrel his deed whom he represents.

It was *replied*, The defender is still minor, and his service as heir general was to his lesion; because, he was heir of provision by his mother's contract, and, as such, had interest to quarrel any deed done in fraud of the contract, contrary to the provisions thereof.

The pursuer *duplied*, *1mo*, There was no fraud in granting the obligation libelled; because, the defender's grandfather having disposed his whole estate to his eldest son, leaving no fund for providing his other children, it was a just and reasonable act of administration, that the eldest son should grant, and his father accept, of a bond for securing younger children in a small sum, not exceeding 1000 merks; *2do*, The defender succeeds to his father, not only in the tenement and ten acres, specially provided in the contract to the heirs of the marriage, but likewise in a considerable conquest, whereof a condescendence is given; and, therefore, the pursuer ought at least to affect the conquest.

The defender *answered*, *1mo*, An heir of provision is, indeed, liable to all onerous or rational deeds of administration; and if, after the contract, his father had fairly and openly granted the bond libelled, it might have been considered as a just and reasonable act; but the defender insists chiefly on this ground, that the bond was a private latent paction betwixt the father and the son, at the time of the contract, to burden the provisions in favour of the heirs of the marriage, which, if sustained, might have been a foundation to enervate the contract: And it is of most dangerous consequence to give the least encouragement to private transactions betwixt father and son, in prejudice of the wife and heirs of the marriage, whose friends rely upon the faith of the public contract; *2do*, Albeit there be a more ample power to dispose of, or burden conquest, than of special sums or rights provided to heirs of a marriage; yet, in this case, the reason of reduction militates equally against both, *viz.* that the bond was a private latent transaction, contrary to the public communing with the wife's friends: Neither are such bonds reckoned altogether free upon the husband's part, because of the influence that a father hath upon his son,

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and that the father disposes his estate in the son's contract of marriage, according to communing, and so hath it in his power to exact from his son privately what he pleases, against which the law most justly provides.

"THE LORDS reduced the defender's father's obligation, as in defraud of the contract, and that not only in so far as the same might affect the tenement and acres specially disposed, but also in so far as it might burden the conquest; and found the defender's service, as heir of line, reducible on minority and lesion."

Dalrymple, No 23. p. 28.

1705. February 21.

GRIEVE against JOHN THOMSON.

No 29.

In a contract of marriage, a father bound himself to pay a sum to his son and his wife in conjunct fee and liferent; but, prior to the contract, he took a discharge from his son, declaring, that, though his father should be bound in the contract, yet the sum was never to be exacted. The discharge was reduced, as *contra fidem pactorum nuptialium*.

By minute of contract of marriage betwixt John Thomson and Margaret Grieve, John Thomson elder provides 500 merks and certain tenements, and John Thomson younger provides 1000 merks of his own to the future spouse in liferent, and to the children in fee; and, by a contract of marriage posterior, these sums and tenements are provided in the same way.

John Thomson younger disposes all he had to his wife; and, after his death, she charges John Thomson elder to pay the said sum of 500 merks: He suspends, and *alleges*, That his son, who was fiar in the sum, had discharged the same posterior to the minute; and because there was a contract to be extended, the discharge bears, that though his father should afterwards be bound in the contract, yet the sum was never to be exacted.

It was *answered*, The discharge was null, as *contra fidem pactorum nuptialium*, and fraudulent; *2do*, The obligation in the contract was posterior to the discharge, and introduced a new obligation, whatever the discharge might otherwise import.

It was *replied*, The charger hath no interest in the sum, except for her liferent, as to which, he will not obtrude the discharge; but for the fee, her title is only as assignee by her husband, who was the fiar, and might freely discharge the same; and both law and equity do favour the pursuer in exacting the same, because he was drawn to exorbitant terms for his son's satisfaction, whom he saw to be a tender weakly person, not likely to survive the marriage long, as it happened; he got but a small portion, which was to return, failing heirs of the marriage; and she also impetrate from the husband a disposition of all he had, in prejudice of the suspender's numerous family; and the discharge does expressly declare, that the contract to be made shall not be effectual as to that sum.

It was *duplicated*, That the circumstances of the contract, and any deed done in the charger's favour, could all be justified, if needful; but the point of law

lies in this, that private deeds, contrary to solemn contracts of marriage, are fraudulent *contra bonos mores*, and ought to receive no encouragement from any judicature; and such discharges are prejudicial to the wife, not only for her liferent interest, but in so far as they cut off the fund of sustaining the married couple, and educating the children; and such unfair dealings could even be quarrelled by the granters of private discharges themselves, as being elicited at a time when children cannot debate nor contend with their parents, and ought not to be imposed upon; and it is reasonable, and necessary, that all such underhand practices should be discouraged; for who can be secure in matching their daughters, if private pactions can evacuate solemn contracts of marriage, upon the faith whereof matches are made, and settlements for maintenance of the married persons and their issue?

“THE LORDS found the discharge null, not only as to the liferent, but the fee, as being *contra pacta dotalia*, and fraudulent; and did not proceed to determine on the other point, *viz.* that the contract was posterior, being willing to discourage all such underhand transactions.”

Fol. Dic. v. 2. p. 21. Dalrymple, No 61. p. 77.

* * * Fountainhall reports this case :

1705. February 24.—JOHN THOMSON, merchant in Jedburgh, being to marry Margaret Grieve, in the contract of marriage the said John's father disposes the fee of some houses to him, and likewise becomes obliged to pay 500 merks; and both these are provided to the wife in liferent, and her father engages for 400 merks of tocher. Thomson's father prevails with his son to give him a clandestine discharge of the 500 merks before the marriage, (which subsisted little above a year;) and Thomson being dissatisfied with his father's impetrating that discharge without any payment from him, he assigns the same 500 merks to his wife, and gives her the fee of the houses, there being no children, (for which some called him a true John Thomson's man;) and he dying, his relict pursued Thomson, her father-in-law, for payment of the 500 merks. He founded on his discharge from his son, and *alleged*, That he being of a tender and sickly constitution, his wife's friends had so far imposed on him, as to make him yield to the most extravagant conditions; and he entreating his father to comply with them, offered freely to discharge his father of the 500 merks, if he would but please his wife's friends so far as to put it in the contract. *Alleged*, The taking the discharge was a manifest cheat put upon the wife and her father, who upon the faith of that obligation entered into the contract, which otherwise they would not have done; and being *contra fidem tabularum nuptialium*, it is a paction reprobated in law; and if such fraudulent private transactions were allowed, there were no security by contracts of marriage, which are the most solemn deeds, and ought to be *uberrimae fidei*; for when parties think themselves secure by what provisions they see there, they can

No 29.

be all frustrated and evacuated by private discharges, contrary to that fidelity and trust amongst mankind, and the rule of law, that *nemo debet ex proprio dolo lucrari*. *Answered*, The farthest this can be pleaded is, that her husband's discharge cannot prejudice her *quoad* the liferent of the said sum, which is all the interest she has in it; but as to the fee, the discharge must stand good, seeing she can pretend no sort of damage, being not only liferentrix of all her husband's means, but likewise made fiar of his houses, &c. so that *nihil ei deest*. And as to that brocard, *Fidei pactorum dotatium non licet derogare*; *Perezius ad tit C. De pact. convent.* cites no express law for it, but refers to *Annaeus Robertus*, lib. 2. cap. 2.; et *Tuldenus eod. tit. Cod.* founds its authority on the consequence of sundry laws. The first is, *l. 3. D. De extraord. cognit.* which case the doctors extend and apply thus; a bride's father threatens the bridegroom, that he will not suffer his daughter to marry him, unless he remit him a part of the tocher, or the bridegroom's father tells him, I will not consent, unless you discharge me of a part of my obligations, and he does both for fear the marriage go back. The other laws are, *l. 7. D. De pact. dot. et l. 7. C. De jure dot.* from which they infer, when a good-father and a son-in-law make a paction derogatory to the pactions contained in the contract of marriage, which were given *ad sustinenda onera matrimonii, tale pactum sponsæ non consentienti præjudicare non potest*. Some of the LORDS thought the discharge was null, in so far as it prejudged her *jus quasitum*, viz. the liferent of the sum provided to her in the contract; but the generality of the LORDS thought the taking a gratuitous discharge in such a manner was an act against common honesty and morality, and therefore reduced it simply *et in toto*; for if such pactions were any way sustained, then none had security by any provisions made to them in contracts of marriage.

December 1.—IN the case mentioned 24th February 1705, betwixt Margaret Grieve and John Thomson, her father-in-law, the discharge he had taken from his son her husband, being there reduced and annulled, as *contra fidem tabularum nuptialium*, he now founded on another receipt to infer compensation against her, whereby his son, in the journal account-book of the shop, acknowledged the receipt of L. 283 Scots from his father. *Alleged*, It was null, neither bearing writer's name nor witnesses. Next, it was false, seeing his son, when a young boy, being his apprentice, had wrote his name up and down sundry pages of that book in a childish manner, and above one of these scribblings this receipt was filled up, as appeared by ocular inspection. *Answered*, They opposed the receipt, where the subscription appeared evidently to be the son's hand-writ; and that the receipt was superinduced, was *gratis dictum*; and that, in fortification of it, they could prove he had bought his son plenishing to that value, and delivered it to him, and thereon took his receipt for the sum; and that, by the 9th act, Parliament 1669, holograph subscriptions in count-books were probative for twenty years without witnesses. *Replied*, Though the sub-

scription might be his son's, yet it was clear that it has been wrote by him at random, when a boy, and quite differs from his subscription to his contract of marriage, and other papers signed by him after he came to be a man; and so being null, cannot be adminiculate; and this case falls not under the act of Parliament 1669, for that relates only to counts constituting and acknowledging debts, but this is a receipt and discharge relative to no account. THE LORDS found the receipt founded on in this book not probative, and null; and therefore repelled the compensation, and found the letters orderly proceeded, and decerned him to pay all the expenses of the process, and the said Margaret's damages, as as shall be given up in account, and as she shall verify upon oath; And, in regard of his tampering to vitiate the count-book, they fined him in 500 merks, and sent him to prison, there to lie till he paid the same, and till he applied to the Lords for obtaining his liberation. And accordingly a warrant for his commitment, bearing the cause, was signed *in præsentia*, conform to the late act of Parliament for personal liberty in 1701. Forgery turning so barefaced and bold, the LORDS thought it fit by such examples to discourage it.

Fountainball, v. 2. p. 272. & 295.

* * This case is also reported by Forbes :

1705. December 1.—MARGARET GRIEVE as having right by assignation from the deceast John Thomson her husband to 500 merks, which John Thomson elder obliged himself in their contract of marriage to pay to the cedent and his heirs, charged her father-in-law for payment : Who suspended upon these reasons, *imo*, The cedent had discharged the sum betwixt the minute of the contract of marriage and the extending of the contract itself; *2do*, He offered to prove by the charger's oath, that her husband and she had received household furniture and goods to the value of the sum charged for. THE LORDS repelled the first reason of suspension, and reduced the discharge granted betwixt the minute and contract as *contra fidem tabularum nuptialium, et bonos mores*.

When the charger came to depone upon the second reason of suspension, the suspender past from her oath, and offered to prove the allegiance *scripto*. And to that effect produced an account-book wherein there was a receipt of L. 286 written by the suspender, and subscribed by his son.

Alleged for the charger; That the suspender had, falsely with his own hand, made up and superinduced that receipt to her husband's subscription, who, when apprentice to his father, bad, in a childish way, written his name in several places of that account-book, to try his hand. And, to fortify the suspicion of a fraudulent contrivance, urged the reasons followed: *imo*, The suspender deceitfully elicited the discharge reduced as *contra bonos mores*; and *semel malus, semper præsumitur malus*, especially in this case, where the first deed of fraud was designed to evacuate the same claim; *2do*, It is inconceivable why the suspender referred his allegiance to the charger's oath, when he had so

No 29. clear-a discharge ; but it seems he had not then filled up the receipt, or entered so deep upon the contrivance ; 3^{tho}, There being but eight days intervening betwixt the discharge reduced, and the date of the posterior receipt quarrelled, it is not probable the suspender, who was so desirous to pay nothing, would so suddenly have made payment of the most part ; or that having a receipt upon real performance, he would have suffered his good name to be called in question for the first discharge, without supporting it by the production of the second ; 4^{tho}, The husband's subscription in the book produced, is disconform to his subscription in other writs in his manhood, and therefore has been writ by him when he was a boy ; 5^{tho}, The subscription to the receipt appears to have been a childish scribbling ; for the subscriber's name stands written after the same manner in 20 other parts of the book, which the suspender had industriously blotted out, to conceal the congruity of these subscriptions with that of the receipt. It may also be observed, that to cover the scribbling under the subscription, there were several accounts pinned on. Lastly, There is no article of business marked in the said book after the year 1697, except this receipt in the year 1703, and another in 1701.

Answered for the suspender ; 1^{mo}, It cannot be concluded that every thing that is contrary to the law of Scotland, is *contra bonos mores* ; nor can a person, who is no lawyer, be justly charged with malice, for not observing the niceties of the municipal law of his own country ; 2^{ds}, The reason why the suspender did first refer his ground of suspension to the charger's oath, was to vindicate himself from her calumny by her own testimony ; but afterwards being informed she would prevaricate in her deposition, he thought fit to resile, and prove his allegiance *scripto* ; and it is a most artificial and absurd inference, that the suspender referred the cause to the charger's oath before he contrived the receipt, and resiled after contriving ; 3^{tho}, It is true, the suspender at first thought not himself obliged to pay the sum charged for after the first discharge ; but immediately after the marriage, he was told by intelligent persons upon what head it was quarrelled, and therefore took the now controverted receipt from his son ; 4^{tho}, As the charger's husband was a man of a very unconstant head, so he was a man of a very unconstant hand, and varied his subscription frequently ; and therefore nothing can be drawn from the disconformity of his subscriptions ; 5^{tho}, It is a caluminous gloss to assert that the father scored out the son's name in the book to conceal the congruity of the subscriptions ; since it is a thousand times more probable, that the son was so cautious as to delete his own name for fear of superinduction, and that he would also have delete his subscription to the receipt, had it not been a true deed of such a date ; as to the insinuation that some receipts were pinned upon that founded on in the book, the better to cover the contrivance ; there is no more sense in it than to conclude that where several papers are tacked together, that which falls to be uppermost was so placed to hide the rest ; and no more could the

suspender, if he were not an idiot, fancy, that the pinning of other papers upon the receipt in the book, might hide it, than the first or second leaf of a book could hide the third; *Lastly*, The reason why the suspender did not insert other business in that book, was to conceal from his younger children the transactions betwixt him and his eldest son.

THE LORDS found the receipt in the book founded on null, and not probative, and therefore repelled the reason of suspension; and decerned the suspender to pay all the expenses of the process, and the charger's damages to be given up in an account by her upon oath; and for his tampering to vitiate the account-book, he was fined in 500 merks, and sent to prison till he paid it, and applied to the Lords for his liberation.

Forbes, p. 48.

1709. *January 28.*

WILLIAM M'GUFFOCK of Rusco, and his Lady, *against* DAVID and JAMES BLAIRS, Sons of the second marriage to Hugh M'Guffock, the said William's Father.

HUGH BLAIR, *alias* M'Guffock of Rusco, in his contract of marriage with Mrs Margaret Dumbar, daughter to Sir David Dumbar of Baldoon, his second Lady, provided her to a life rent annuity of L. 1,000 Scots, and the children of the marriage to 50,000 merks. Thereafter in *anno* 1695, in a contract of marriage betwixt William M'Guffock, his eldest son of the first marriage, and Mrs Elizabeth Stuart, daughter to the Laird of Ravenston, he disposed the estate of Rusco in favours of William and the heirs-male of the marriage, with the burden of 45,000 merks of debt, and obliged himself to warrant the lands disposed to be worth 8,000 merks of yearly rent, and burdened his other estate with making the same good and effectual, in case the rent of the lands disposed fell short. Hugh M'Guffock, after his eldest son's contract, before his marriage, entered into a transaction with him; whereby the father gave him some land and moveables not contained in the contract; and the son obliged himself to pay all his father's just and lawful debts, and discharged the obligation to make the lands disposed to him worth 8,000 merks yearly; and the father, with consent of his son the bridegroom, disposed to David and James Blairs, two sons of the second marriage under pupillarity at the time, some lands out of which the father stood obliged to make those disposed to the eldest son worth 8,000 merks of rent. William M'Guffock, now of Rusco, raised reduction of the dispositions to David and James Blairs, as granted *contra fidem tabularum nuptialium*.

Answered for the defenders; They were creditors by their mother's contract of marriage in 50,000 merks, in prejudice of which provision the father could do no voluntary gratuitous deed in favours of his eldest son of the first marriage, but what not only they might quarrel upon the act of Parliament 1621,

No 29.

No 30.

A person disposed an estate to his eldest son, in his son's contract of marriage, warranting it to be worth a certain yearly value, and he burdened another estate with making the same good. Before the marriage, he took a discharge from the son of this obligation. In a reduction of the discharge against the father's other representatives, to whom the separate estate was disposed, the pursuer's estate falling short of the rent at which it was warranted, the Lords reduced the discharge as *contra fidem*.

Nò 30.

but did subject him, who was *alioqui successurus passive*, to the payment of their previous debt; for, by our law and practice, a disposition of heritage to an eldest son even in his contract of marriage is reckoned *præceptio hæreditatis*, and infers the passive title of *successor titulo lucrativo post contractum debitum*; seeing, though such a contract of marriage be onerous *quoad* the wife's liferent, it is lucrative and for love and favour, in so far as concerns the eldest son, Stair, Book 3. Title 7. § 3. *2do*, Though any deed in favours of the father might be reduced as *contra fidem tabularum nuptialium*, the deeds quarrelled must stand; because, made to the defenders who had no accession to the fraud, which is personal in the father, and no *vitium reale*. A ground of reduction upon fraud cannot militate against innocent third parties acquiring for onerous causes, July 16th 1672, Duff *contra* Fowler, *voce* PERSONAL and REAL; and the defenders (who were noways partakers of their father's fraud, yea by reason of their non-age, incapable to know any thing of the transaction) have the dispositions in implement of the provision in their mother's contract of marriage, which is a most onerous cause.

Replied for the pursuers; It is irregular and incongruous *in hoc statu*, to argue concerning the pursuer's being liable personally for the debt claimed by the defenders; because, the present question is not about the cause of the deed, for which the defenders may pursue as accords, but the reduction of the deed itself made fraudulently *contra fidem tabularum nuptialium*, which was reducible in his father's lifetime, when the pursuer could neither really, nor by fiction, be his heir; 'Et quod ab initio non valuit, tractu temporis non convalescit.' *2do*, Albeit the defenders are not presumed to have been conscious of their father's deed in their eldest brother's contract of marriage; his knowledge and deed are to be reputed theirs, who were pupils under his legal administration; because, *Nemo debet ex alieno dolo lucrari*. And albeit a tutor's fraud cannot be a ground to take from his pupil what is already his property; yet 'Dolos tutoris nocet pupillo in eo negotio in quo jus acquirit pupillo, L. 10. § 5. D. Quæ in fraudem creditorum.' By the same analogy of law, the oath of a wife *præposita negotiis* proves against and prejudiceth her husband, December 7th 1675, Dalting *contra* M'Kenzie, No 212. p. 6005. Yea, Paton *contra* Paton, No 26. p. 9475.; it being communed at a contract of marriage, that the son should not be subject to debts or children's provisions, the LORDS reduced a bond taken from him betwixt the contract and marriage by the father, in favours of creditors or other children, as depending upon the father's deed, *contra fidem tabularum nuptialium*. So that there is an evident distinction betwixt directly acquiring to a third party, by one who *in ipso negotio* is *in mala fide*; and a third party's purchasing *bona fide* for an onerous cause, from a person, what he *mala fide* had formerly acquired to himself.

Duplied for the defenders; The right to them for onerous causes cannot be taken from them by the fraud of their administrator in law, who was debtor in the very deed, and obliged to implement their mother's contract; which is

not like a fraudulent deed done by a tutor in favours of his pupil, to whom he was not debtor. And the decision, Paton *contra* Paton is not to the purpose, for there the bond was taken by the father from his son without a preceding onerous cause.

Triplied for the pursuers; A tutor who is debtor to his pupil, acquiring to him fraudulently in satisfaction of that debt, puts his pupil in a worse case, than if the tutor were not debtor; because, a tutor who is debtor is under stronger temptation to do so, than one who is disinterested; and a tutor bankrupt cannot by partiality prefer his pupil to other creditors. A tutor who is also debtor to his pupil, *duplicem personam gerit, et ego non sum ego*; and though he cannot authorise his pupil *in rem suam*, yet when he *qua* debtor *mala fide* disposes to his pupil, *perinde est*, as if he did *mala fide* acquire from another for his pupil, which acquisition would be reducible upon the tutor's fraud.

THE LORDS repelled the defence, that the disposition in favours of the children of the second marriage, was made by the father with the pursuer's consent, for an anterior onerous cause in their mother's contract of marriage, in so far as would extend to the sums provided by the said contract; in respect of the obligation in the pursuer's contract of marriage, to make up the estate disposed to be worth 8,000 merks of yearly rent out of the father's other lands and estate; and therefore sustained the reason of reduction.

Fol. Dic. v. 2. p. 21. Forbes, p. 313.

1716. July 20. GORDONS *against* Sir WILLIAM GORDON of Lesmore.

DUFF of Drummuire having contracted his daughter with the eldest son of Sir James Gordon of Lesmore, the whole estate of Lesmore, without reserving any thing, saving a yearly aliment to Sir James, was disposed in the contract, and Drummuire paid a suitable tocher; but the day before the marriage, there was a private paper granted by the son to his father Sir James, wherein he obliges himself to grant bonds of provision to his younger brethren and sisters, for such a sum of money as his said father should think fit to bestow upon them, payable at what terms the father should determine. The son having died without making these bonds, Sir James himself, in supplement thereof, granted bonds of provision to his said younger children: And now Sir William the grandchild, being pursued upon the said bonds, repeats a reduction upon this head, that they were granted *'contra fidem tabularum nuptialium et pacta dotalia,'* both in relation to Drummuire the father, who paid the tocher, and Sir William the heir of the marriage.

Answered for the pursuer; That the obligation granted by the son is no ways derogatory to the contract, it not being provided in the contract, that the estate shall not be burdened with the children's provisions; for, though it be not expressed that it shall be, yet there is a great difference betwixt doing

No 30.

No 31.

A father disposed his whole estate in his son's contract of marriage, reserving an annuity to himself; but before the marriage, the son became bound to grant suitable provisions to the other children. The Lords found that, in regard there was no obligation in the contract of marriage to relieve the son of the younger children's provisions, the bonds libelled.

No 31.

so far as rational provisions, were not granted *in fraudem pactorum*.

deed whereof there is no mention in the contract; for, had it contained an express clause burdening the father with the children's provisions or the like, then the latent obligation had been indeed *contra fidem*; for that imports contrary to what is pactioned; but here there is no such provision: And therefore, *2do*, As a consequence of this, where father and son are not expressly tied up by the contract, they may do rational deeds; and it is a very rational deed to provide younger children; nay, it was *debitum naturæ* upon the father, and consequently upon his son and heir, *præcipiens hæreditatem* by the contract; and since Drummuire knew there were younger children *in familia*, and unprovided, he could not think but that the father and son might, notwithstanding of the contract, reasonably provide for them; and what is rational cannot be said to be fraudulent.

Replied for Sir William Gordon; That the marriage-settlement being fairly stipulated, and it being therein agreed, that the lands enumerated should be disposed, without any other reservation than the father's aliment; and the tocher being accordingly paid; therefore, as Drummuire could elicit no deed from his apparent goodson, prejudicial to the contract, no more could Lesmore the father: *2do*, Here Lesmore younger was plainly concussed, the paper in question being elicited before signing the contract, for he was thereby put under a force either to go into any terms his father should propose, or suffer the marriage to be deserted: *3tio*, The paper was subscribed without the presence or knowledge of Drummuire, or any of his friends.

To the *second*, *replied*; That though it was reasonable Sir James should provide his younger children, yet, in common honesty, these provisions ought to have been propaled at communing about the marriage: Thus Voet, speaking of *pacta dotalia*, and clandestine frauds which may be used in prejudice thereof, says, 'Non enim fraudibus hisce, quibus mortales etiam prudentissimi capi, decipi, ac circumveniri, facile possent, indulgendum est;' and Groenwegen, *ad l. 4. G. De dot. promiss.* putting the case betwixt public and private marriages, says, 'Ita et clandestina, quæ, insciis propinquis, aut altera parte super dotibus et donariis, adversus publicos contractus ineuntur, pacta, nostris, et aliorum, moribus adeo improbantur, ut publicis tabulis standum sit, et secreta pactio paciscentibus non suffragetur.' And the Lords' decisions do here agree. Thus, 29th Nov. 1626, Scot against Scot, *voce* PROVISION TO HEIRS AND CHILDREN; and Paton against Paton, No 26. p. 9475. the present case is almost decided *in terminis*: And Margaret Grieve against John Thomson, No 29. p. 9478. the Lords reduced a discharge, granted by a bride-room to his father, of a sum he had engaged for in the contract, as being *contra fidem tabularum nuptialium*: So that the very keeping up of the said debts, or exacting an obligation of the above nature to grant provisions to the younger children, where there was no other fund for their payment than the estate disposed, was an express violation of the contract.

"THE LORDS sustained the reason, that the bond by the defender's father was granted *contra fidem pactorum nuptialium*, and reduced that bond."

No 31.

Act. Sir W. Pringle.

Alt. Horn.

Clerk, M'Kenzie.

Fol. Dic. v. 2. p. 22. Bruce, v. 2. No 20. p. 24.

*** Lord Kames account of this case is that given on the margin, which does not accord with Bruce's report. See APPENDIX.

1716. November 22.

The Viscount of ARBUTHNOT *against* MORISON of Prestongrange.

By contract of marriage betwixt the Viscount of Arbuthnot and Prestongrange's daughter, Prestongrange is bound to pay a portion of 50,000 merks; but there being a declaration and obligation granted by the Viscount of Arbuthnot, the day immediately before the contract of marriage, narrating, 'That he was resolved to marry the young Lady, and to enter into a contract, in which there was to be a portion of 50,000 merks provided to him; and that he was to give a jointure suitable to his circumstances, and the marriage-portion; but that he was sensible that Prestongrange would be at great charge by the marriage; and that seeing his friends would have 50,000 merks to be insert in the contract, (albeit Prestongrange had refused to give more than 40,000 merks) it was his earnest desire to Prestongrange, that 50,000 merks should be insert in the contract; but that he obliged himself, upon his honour, to discharge 10,000 merks thereof,' &c.

The Viscount designing to claim the full 50,000 merks, pursues a reduction of the declaration and obligation, as being elicited from him in his minority, without the consent or knowledge of his honourable friends, who were treating for him; and to his lesion, in as far as he gave provisions suitable to the portion, fifty chalders of victual to the Lady in liferent, and if there were but one daughter of the marriage, the Lady's portion of 50,000 merks to that daughter, and proportionally more. if two or more daughters; and the portion of the one daughter is expressed in the contract thus, "To her the mother's portion underwritten:" Which was a manifest lesion, reflection and affront upon the Viscount's friends, who were drawn in to be witnesses to a contract in the lowest terms to which they would acquiesce, and yet that contract to be made ineffectual by private influence upon a minor. *2do*, The said obligation was *contra pacta dotalia*, which is reprobated by the law of this and most nations; as is observed by Voet in his commentary upon the title, *De pactis dotalibus*, and Gronvegan ad l. 4. C. *De dotis promissione*, and Perezius on the title, *De pactis conventis tam super dote*, &c. And thus it was decided in the Parliament of Paris, as is observed by Annæus Robertus, *Rerum judicatarum*, l. 1. cap. 2. where he has the pleading at length, agreeing almost *in terminis* with the present case, being a discharge elicited from the bridegroom of a part that was stipu-

No 32.

A discharge of part of the tocher before solemnization of the marriage reduced as *contra fidem tabularum nuptialium*, at the instance of granter himself, who was minor, but without curators, because granted privately without the concurrence of friends whom he had engaged to assist him in the marriage treaty.

No 32. lated *nomine dotis*; and the like also found with us, 1st December 1705, Grieve. *contra* Thomson, No 29. p. 9478.

It was *answered* for Prestongrange; The reasons of reduction are not relevant. It is true, the pursuer was minor, but he had no curators, and was *majorennitati proximus*, and was not lesed, because the portion was competent, and it was in his own power to accept the sum offered, in which he needed not the consent of his friends; for it was but a point of respect to them, that he chose rather to deal with Prestongrange privately, than to make any public struggle. 2do, Whatever might be said, if Prestongrange had elicited a bond, declaration or obligation from the Viscount, by proposing the expedient to him, yet the paper bears, and is matter of fact, 'That Prestongrange was prevailed with, at the Viscount's desire, to satisfy the friends in the public contract.' And if he were overtaken, he would be the person ensnared, and not the Viscount, Et minoribus deceptis non decipientibus jura subveniunt; and if need be, what is affirmed in the Viscount's declaration is offered to be proved, viz. 'That the defender refused a greater portion than 40,000 merks, and that he agreed to insert 50,000 merks in the contract, and accepted of the Viscount's obligation at his own desire.'

And as to the lesion, by giving greater provision to the Lady and daughters; these are but casual and accidental lesions, which may or may not happen, and restitutions *in integrum* go not beyond the lesion; so that at worst the 10,000 merks could only be subjected to make up that liferent, in the event that the Lady should survive, or that there were only daughters of the marriage.

And as to the other reason of reduction, That the declaration was *contra pacta dotalia*, and the several decisions and citations on that subject; it is *answered*, None of these will quadrate to this particular case; for here there is nobody concerned in the present question, but the pursuer and defender, who came to an agreement in the terms of the pursuer's declaration and obligation at the time of the treaty, and that paper is a part of the bargain, and qualifies the contract *ab initio*; but where contracts are completed, or minutes of contract, and afterwards altered, either before the public contract, in the case of minutes, or after, and before marriage; such deeds are justly reducible, as *contra pacta dotalia*; but where the deed is before the contract expressing the terms on which the contract is extended, and what is truly communed and designed, it qualifies the contract as a back-bond doth a bond. And the applying of that rule, will answer any practick that can be founded upon in our law. And as to the foreign authors, what they say has a special relation to their municipal customs; neither doth our law quadrate with the civil law, in what relateth to portions whereof the property remains with the wife.

It was *replied*; That contracts of marriage are the most solemn contracts, in which the greatest sincerity and integrity are required, and the least enormity is by consequence redressed without mitigation. It was indeed in the Viscount's power to marry without his friends, and without a portion too, if he would;

but then the marriage ought to have been publicly in that method, as by himself, they not concurring; but seeing the pursuer had that respect for his friends, that he would not disoblige, or deal without them, and that they would not comply and concur in other terms than those of the contract; fair dealing would have required, that the defender should have complied with the friends, or openly refused; and then the Viscount was to hear their advice, and either to reject them, and marry without their concurrence; or comply with them, and break the marriage. But to deal privily without their advice, was unfair; and yet more so, in as far as the highest conditions for the Lady and daughters of the marriage, were obtained suitable to the portion of the contract, as the Viscount's declaration expressly bears, and whereby there was a manifest lesion to the minor. And though, in some cases, reductions upon lesion are restricted to the true damage; yet in others, not; and the just punishment of clandestine dealing in a treaty of marriage, to the minor's lesion, ought to annul the deed *in toto*, upon both the reasons of reduction.

"THE LORDS repelled the defence, and reduced."

Fol. Dic. v. 2. p. 22. Rem. Dec. v. 1. No 1. p. 1.

No 32.

1718. February 8.

POLLOCK against CAMPBELL of Calder.

No 33.

SIR HUGH CAMPBELL of Calder, in his son Sir Alexander's marriage articles, became bound to provide his estate to his son and the heirs-male of the marriage "free of all charge and burden;" having reserved no power to provide younger children. He, at the same time, privately elicited from his son a promise to grant him a faculty of burdening the estate with L. 2000 Sterling to his younger children; which promise, Sir Alexander fulfilled about two years after the marriage, upon the narrative of the said promise, and that the marriage articles had been entered into in compliance with the bride's friends and lawyers, that there might be no stop of the marriage. Sir Hugh having exercised this faculty granted him by his son; in a pursuit against the heirs of the marriage, for payment of this sum, the LORDS found, that the particular communicating betwixt Sir Hugh and Sir Alexander before the marriage was *in fraudem pactorum nuptialium*; and seeing the bond was granted by Sir Alexander, though posterior to the marriage, on the narrative of the said prior communicating, and that the marriage articles were only made and granted by Sir Hugh in compliance with the bride and her friends; therefore, that the said bond was not binding on the heir-male of the marriage. See APPENDIX.

Fol. Dic. v. 2. p. 22.

1739. December 19.

RUSSEL against GORDON.

No 34.

In a case similar to Pollock against Campbell, No 32. p. 948, a bond of provision was reduced, tho' it did not go upon the narrative of a promise elicited from the granter before his marriage, but then it appeared by a letter written by the father to his correspondent, along with his son's contract of marriage, which he had signed, that he had given instructions to his correspondent not to deliver up the contract until he should get a private obligation from the son to grant a bond of provision to his brothers and sisters.

By contract of marriage between John Gordon, son of Robert Gordon of Halhead, merchant at Boulogne, with consent of his father, and Amie Bondler, with consent of Thomas Bondler of London, her father, signed at Boulogne and London in January 1729, Robert Gordon, in consideration of the marriage and tocher agreed to be paid, became bound "to resign his estate in Scotland therein mentioned, in favour of his said son in liferent, and the heirs-male of the marriage in fee, and to the bride for her liferent therein mentioned; and became bound to free the said estate of all incumbrances."

The day after the solemnization of the marriage at London, John the husband, on the narrative of the said contract of marriage, whereby his father had become bound to resign his whole estate, and that it was just his brothers and sisters, the other children of the said Robert, should be competently provided, became bound within a year after his father's death, to pay the sum of L. 20,000 Scots to the four younger children of the said Robert, in such proportions as he should appoint.

In the action at the instance of one of the younger children for her proportion of the said sum, it having been made appear by the letters of Robert Gordon sent along with the said contract of marriage to his correspondent at London, that he had directed him not to deliver up the contract, till his son should grant the foresaid obligation, cautioning him to say nothing of it to Mr Bondler, the LORDS "found that the said bond was *contra fidem tabularum nuptialium*, and therefore is of no effect during the subsistence of the marriage between John Gordon and Amie Bondler, or the existence of children of the said marriage."

The circumstance of the bond's being dated after the marriage was not regarded, as it was granted so *de recenti*, and that Robert having discharged the giving up the contract till his son had agreed to his proposal, he was supposed to have engaged to grant the bond before the correspondent had given up the contract; and as to the legal effect of *pacta contra fidem tabularum nuptialium*, or relevancy of the objection, though it was urged for the pursuer that it could in this case neither lie to the wife nor children, whose respective interests of liferent and succession to the estate were absolutely secured, so it could not lie to the husband the defender, against his own voluntary deed; yet the LORDS found as above.

They considered the objection to lie not only to the wife and children, but to the granter himself; otherwise the effect of voiding such pactions would be eluded: That every one must be sensible that the father of the bride would as little have agreed to his daughter's marriage, if, by a restriction of, or burden on the settlement made by the father of the bridegroom, his fund for subsisting his family was lessened during the subsistence of the marriage, as he would

have done had his daughter's liferent or the childrens provisions been to be thereby affected. It was indeed said, that it might be a question, Whether such a deed would be effectual against the husband himself, should the marriage dissolve by the death of the wife without children? But as that was not the case at present, there was no occasion to give judgment upon it; mean time, with respect to that point, a distinction may seem not improper, that if it was an imposition by the father upon his son, who being once engaged in affection to the bride, would rather comply with any terms than be disappointed of the marriage, even the son might in that case reduce, as he might on any other ground of concussion; but if the case should appear to be not a concussion upon the son, but which often happens, a fraudulent contrivance between father and son, to deceive the bride and her friends, the case might receive a different consideration.

N. B. There is a petition against this interlocutor not advised; but as it is only laid upon the point of fact, without controverting the relevancy, this is a judgment on the point of law.

Fol. Dic. v. 2. p. 22. Kilkerran, (PACTUM ILLICITUM.) No 1. p. 361.

1740. December 23.

LUNDIN against LAW.

FOUND, That the exception against a deed as *contra fidem tabularum nuptiarum* was perpetual, and therefore competent even after the lapse of forty years, where the prescription of the claim itself had been interrupted by minority.

Fol. Dic. v. 4. p. 30. Kilkerran, (PACTUM ILLICITUM.) No 2. p. 363.

S E C T. VII.

Pactum super hæreditate viventis.

1630. July 6.

AIKENHEAD against BOTHWELL.

THE LORDS found it not unlawful to Mr James Aikenhead to sell to his brother, Mr Adam Bothwell, all the gear that his wife should happen to fall by the decease of Adam Bothwell her father, notwithstanding of the civil law alleged *quod pactum sit illicitum de successione viventis*.

Fol. Dic. v. 2. p. 23. Auchinleck, MS. p. 21.

52 U 2

No 34.

No 35.

No 36.

* * Durie reports this case :

No 36.

ADAM BOTHWELL being obliged, in the contract of marriage betwixt Mr James Aikenhead and his daughter, to make her a bairn of his house at the time of his decease, diverse years after there is a contract made betwixt the eldest son of the said Adam Bothwell, brother-in-law to the said Mr James, and the said Mr James, whereby the said Mr James disposes that clause of the said contract, and all benefit which he might have thereby, or by the decease of his said father-in-law, to his said good-brother, who is obliged therefore, by his particular bond, to pay Mr James 8000 merks, at the first term after his father's decease ; which bond being desired to be reduced at the instance of the said Adam Bothwell's son, upon this reason, because it was *pactum contra bonos mores factum super hæreditate viventis*, which is forbidden in law, for thereby the good-son sells his partage of the goods, which he may succeed to, or fall to him, by his father-in-law's decease : This reason was not sustained, but an absolvitor was given therefrom, because the civil law in this case (albeit also it receive diverse constructions and limitations, as if such pactions be made, *consentiente eo, de cujus hæreditate paciscuntur, tunc pacta sic facta tenent*, and sundry others) has no place, according to the laws of Scotland, as in tailzies and renunciations of the bairns' part of gear, and others ; and this was a disposition of that which was provided by the father-in-law to his good-son, in his contract of marriage, which might be in law disposed upon by him, in whose favours it was conceived.

Act. *Advocatus & Mowat.*

Alt. *Nicolson & Stuart.*

Clerk, *Gibson.*

Durie, p. 525.

1708. July 15.

RAGG against BROWN.

No 37.

A disposition by a remoter heir, conveying to the disponent his hope of succession to an estate, when the nearest heir was yet, and many years thereafter, alive, was sustained, though it was alleged to be *pactum corvium de hæreditate viventis*.

JOHN WILLIAMSON, sheriff-clerk of Perth, and his posterity, being deceased, Alexander Ragg, whipmaker in London, being the said Williamson's sister's son, takes brieves out of the Chancery for serving himself heir to his uncle in the lands of Barnhill, and a house in Perth. Isobel Brown, relict of Borthwick of Hadside, *alleging*, she is descended of the said John's uncle's daughter, raises advocacy of Ragg's brieves, on this reason, that though your relation seem nearer than mine, yet I must be preferred, because I offer to prove, that Ragg, your father, being one of Oliver Cromwell's soldiers here in Scotland, during the usurpation, pretended to marry Margaret Williamson, sister to the said John, of which you was born, and yet had a wife then living in England, and was censured for taking two wives in one of their military judicatures they had at that time, and so you being an adulterous bastard, I, as

next in blood, have raised advocacy of your service, and taken out briefs for myself; and the witnesses to prove his being then married, being very old, as this affair is *in re antiqua*, she craved the witnesses might be examined to lie *in retentis*, till the declarator came in by the course of the roll. *Answered*, This allegiance of bastardy, in having two wives at one time, is a mere dream and chimera, and can never be proven; but, on the contrary, Ragg offers to prove, by the whole neighbourhood of Perth, that his father and mother cohabited together as man and wife during their whole lifetime, and were habit and repute such, and never any question nor controversy moved about it; and craved a commission for examining the witnesses thereupon.—THE LORDS advocated Ragg's service to their macers, of consent of both parties, and named two of their own number for assessors, to assist them in any objections that should be made, why neither of the services should proceed till the probation of bastardy on the one side, and of cohabitation as man and wife on the other, were taken.

1708. July 29.—IN the cause, Ragg *contra* Brown, mentioned *supra* 15th July 1708, it was *objected* against Ragg's service, that without a procuratory no man living without the kingdom, as he did, could be served; and as to the procuratory produced, it was null, being a disposition made by Ragg to David Smith, Methven's brother, in 1700, now eight years ago, conveying to him his hope of succession to Clerk Williamson's estate, when the nearer heirs were yet, and for many years thereafter, in life; which is the *pactum corvinum de hereditate viventis* reprobated by the Roman law, as inducing *voluntatem captandæ mortis alienæ*; and it was *contra bonos mores* to dispose on her succession who lived seven years after that disposition, containing a procuratory to serve him heir to her whenever the succession should devolve and exist; and whatever an apparent heir may do, yet a remote presumptive heir cannot till their right exist. And now, after so long time, it may rationally be presumed, that he is dead, in which case his property is dead with him. *Answered*, That the Romans, a jealous people, much given to poisoning, did restrict such bargainings, but our law has repudiated these niceties, and sustained such pactions, as Durie observes, 6th July 1630, Aikenhead *contra* Bothwell, No 36. p. 9491.; and a mandate to be executed *post mandantis mortem* subsists, 18th January 1678, Gray *contra* Lady Ballegernoe, *voce* Tutor and Pupil; and friends may be empowered to divide an estate among children, and take it from one to another, as was sustained in the Laird of Dundas's case; and, by the 13th act Parl. 9. Jas I. no exception is received against the brief of mortancesty; and nothing hinders a person having no present right to resign and dispoise what he has remotely *in spe*, and the supervenient title will accresce to the receiver. And so, by the same rule, a conditional procuratory may be granted, to take effect when his right exists; and though it be some years ago, yet still *presumitur*

No 37. *vivere*, unless they offer to prove dead.—THE LORDS sustained the procuratory as sufficient to carry on Ragg's service.

Fol. Dic. v. 2. p. 23. Fountainhall, v. 2. p. 453, & 459.

* * Forbes's report of this case is No 23. p. 5260. *voce* HEIR APPARENT.

No 38. 1746. July 9. WRIGHT and RITCHIE *against* MURRAY.

THE liferent of a subject being left to a woman, with a power to her of disposing of the subject, at her death, to any of certain persons named, she desired one of the nominees to get a disposition drawn in his own favour; but stipulated, that her husband should have the liferent. The nominee agreed with the husband to give him a certain sum in lieu of the liferent, and took the disposition simply to himself. A reduction of the disposition being brought by the other nominees *contra bonos mores*, the LORDS repelled the reason of reduction.

Fol. Dic. v. 4. p. 30. D. Falconer.

* * This case is No 50. p. 4952. *voce* FRAUD.

S E C T. VIII.

Contravention of a deed by collusion of the depositary.

No 39. 1724. January 28. ELIZABETH LAUDER *against* KATHARINE BROWN, and her Husband.

Found that the depositary of a bond, could not postpone compensation, upon a bond for aliment, which, while in the knowledge of the debt in the bond entrusted to him, he had taken in contravention of it.

THE Representatives of William Brown were pursued by Elizabeth Lauder, as executrix confirmed *qua* nearest of kin to Mary Seton, for payment of a bond for 500 merks, granted by William to the said Mary, dated 23d of March 1706.

In this bond it was expressly provided, 'That the said Mary Seton should not have it in her power to uplift or assign the foresaid sum, or to contract debt, or do any other fact or deed that might affect the same, without consent of David Forrest and William Lauder,' &c. And for Mary Seton's further security, the bond was deposited in the hands of the said David Forrest.

The defence proponed was compensation, founded on a bond for L. 450 Scots, granted by Mary Seton to the said Forrest, and by him assigned to the

defenders; which bond bore in its narrative to be for aliment furnished to the said Mary Seton by Forrest and his mother, for several years preceding 1691.

It was *answered* for the pursuer, That since Forrest was in the knowledge of the qualities in Brown's bond, and was entrusted with it for Seton's behoof, neither did he pretend any claim of aliment at the time of granting it, the compensing bond was an undue imposition on Mary Seton, and could not be regarded.

THE LORDS found, that the bond bearing the qualities therein mentioned, the depositary could not take a bond in contravention thereof for aliment preceding the bond.

Reporter, Lord Cullen.

Act. *Ja. Boswell.*

Alt. *Ad. Watt.*

Clerk, *Gibson.*

Fol. Dic. v. 4. p. 24. Edgar, p. 9.

No 39.

SECT. IX.

Members of the College of Justice buying pleas.—*Pactum de quota litis.*

COLT *against* CUNNINGHAM.

AN advocate may buy land, although the matter be depending by process, notwithstanding of the act of Parliament upon that subject; because, by the act, it is found, that the contravener hereof shall tyne his office and privilege, but not his action. (See act 220. Parl 14. James VI. 1594.)

Fol. Dic. v. 2. p. 24. MS. Cases at the end of Pitmedden's copy of Colvil.

No 40.

1611. June 5. CUNNINGHAM *against* MAXWELL.

AN advocate having bought land to be holden of the King, and perceiving a cause of reduction of a comprising of the said land, will not be excluded from his action, upon allegiance upon the act of Parliament, that it is not leisom to Advocates, or Members of Session, to buy lands depending in plea, and, if they do the contrary, they shall tyne their place, office, and privilege; but their actions will proceed, but prejudice to any party having interest to seek his deprivation, according to the act of Parliament.

Fol. Dic. v. 2. p. 24. Haddington, MS. No 2196.

No 41.
Found in conformity with the above.

1625. July 6.

MOWAT *against* M'LELLAN.

No 42.

IN an action of spuilziation of six kine, pursued by James Mowat, writer, against M'Leilan, it was *alleged*, That he cannot be heard to pursue that action, being a Member of the Session, and being pursued only by him as assignee made by that person, from whom the kine were alleged to have been spuilzied, and so not competent to have been pursued by a Member of the Session, being a bought plea, conform to the act of Parliament; the LORDS sustained this action at the assignee's instance, notwithstanding of the allegiance, and act of Parliament, in respect that there was never any action intended upon that spuilzie at the cedent's own instance; and that the pursuer was not made assignee to an action, but to the deed of spuilziation.

Fol. Dic. v. 2. p. 23. Durie, p. 174.

1635. July 30.

RICHARDSON *against* SINCLAIR.

No 43.

A DECLARATOR being only executed, but never called, nor any process deduced thereupon, the LORDS found, that the buying of the right in question, by a Member of the College of Justice, was not buying of a litigious right, which came under the compass of the act of Parliament.

Fol. Dic. v. 2. p. 23. Durie.

. This case is No 34. p. 3210. *voce* DEATH-BED.

1675. February 24.

HUME *against* NISBET.

No 44.

A Member of the College of Justice, as trustee for an apparent heir, having purchased a debt due by the defunct, and thereupon adjudged the estate; and after the process was at an end, having conveyed the adjudication to the apparent heir, retaining a

KATHARINE HUME, apparent heir to John Hume in the lands of Sheffield, being in hazard to enter heir to him, did employ Mr Archibald Nisbet, writer, to purchase an assignation of a sum due by her brother to Mr James Keith, which he procured for 500 merks, the sum principal and annual extending above 6000 merks, whereupon he adjudged from her the lands of Sheffield, and obtained decret for the bygone duties thereof, intromitted with by Mr Alexander Hume, and thereupon apprised his estate, and was infeft in both; and, after all, he gave a back-bond in favours of the said Katharine, to denude himself in her favours, being satisfied of the 500 merks he paid to Mr James Keith, and of 500 merks he expended in the process and infestments, and retaining to himself a fourth part thereof. Being charged on this bond, he gave in a bill of suspension, whereupon the cause was appointed to be discussed; and alleged that he could not denude till he was satisfied, conform to the back-

bond. The charger *answered*, That she was content to pay what he had debursed, and a gratification for his pains at the sight of the Lords; but alleged, that the detention of the fourth part is not allowable, being *pactum de quota litis*, which is not allowable to advocates, agents, writers, &c. who are prohibit to buy any pleas. It was *replied*, 1^{mo}, That *pactum de quota litis* was only reprobated in the case of advocates, *ne detur causa calumniandi*, as the law beareth, which quadrateth not with writers; 2^{do}, Acquiring pleas or pactions thereanent are only rejected when done *lite pendente*, for here *lis erat sopita* by sentences before the back-bond was granted; and the charger having no means of her own, and all being done upon the peril and hazard of the suspender, she hath neither ground of complaint in law nor equity.

THE LORDS found, that the plea being ended before the back-bond, the retaining of a fourth part was allowable.

1675. July 23.—Mr Archibald Nisbet having charged Margaret Hume upon a bond of 500 merks, she suspends, on this reason, that it appears by the bond, that Mr Archibald being intrusted to adjudge or apprise the estate competent to the suspender, as apparent heir to her brother; that, upon that consideration, she was obliged to pay him 500 merks, and he had right to retain the fourth part of her brother's estate, which is an unlawful paction *de quota litis*, and against the act of Parliament prohibiting Members of the College of Justice to buy pleas. It was *answered*, That the act of Parliament quadrates not to this case, because the bond is granted at that time Mr Archibald denuded himself *post finitam litem*; and the suspender being an indigent person, he did, at her desire, acquire a debt of her brother's, and thereupon adjudged, and run the hazard of his sum, and after all her process was ended, disposed the same in her favours for this obligation; which in no case could be prejudicial to the said obligation, although it might have been a foundation of censure against Mr Archibald, if he had transgressed, as he hath not.

THE LORDS having ordained Mr Archibald to depone, if *pendente lite* there was any agreement; he did depone there was none, but there was a communing before he began the process, and that he got this bond after all was ended; whereupon the Lords sustained the bond.

1676. January 6.—Mr Archibald Nisbet having taken assignation to the sum of 2000 merks due by umquhile Hume of Sheffield, did thereupon adjudge the lands of Sheffield from Katharine Hume, as apparent heir to him, and likewise obtained decret against Hume of St Leonards, for his intromission with the rents of the lands of Sheffield, and apprised his lands thereon, and obtained decreets of mails and duties against the tenants of both, and entered in possession. After all process ended, he gave a back-bond to the said Katharine, obliging himself to denude in her favours, upon payment of 500 merks that he gave out for obtaining an assignation to her brother's bond, and getting the

No 44.
fourth part of the estate as a gratuity to himself, the Lords sustained the transaction after the process was at an end, and found, that it could not be considered as a *pactum de quota litis*.

No 44.

fourth part of the adjudication to himself, and his expenses. The said Katharine having pursued him to denude, as being intrusted by her, as appears by his back-bond, and that upon payment of his expenses only, without a fourth part, which is *pactum de quota litis*, not allowable; it was *answered*, That this *pactum* was only rejected as to advocates, *ne detur causa calumniandi*, which could not be extended to writers to the signet; *2do*, There was here no paction *pendente lite*; for the back-bond was granted after all process were ended. It was *replied*, That the parity of reason rejects such pactions, as to writers and agents, seeing thereupon occasion is given for pleas to vex and trouble the lieges; and albeit the back-bond be after the end of the process, yet the agreement was made before the ending of the process, during the dependence thereof, or before intenting of the process, upon design to intent the same, which is equivalent, the inconveniency being alike in all. It was *duplied*, That the pursuer having no means of her own, durst not enter heir to her brother for fear of his debts; and, before any process, freely offered to Mr Archibald, that if he would buy in a sum of her brother's, and adjudge his estate, he should have the fourth part, and all his expenses, which might very lawfully be done, there being no plea, but a clear debt of her brother's, to affect his estate, which none could oppose; and yet the defender took the hazard, and had no security from her in case he should lose the sums given out by him; and denies any paction or agreement at any time before his back-bond, which could have obliged him to give this back-bond. Likeas, he had already deponed, that there was a free offer before any process.

THE LORDS ordained him also to be examined, whether there was any paction or agreement before, or during the process for implement, whereof he granted the back-bond, after the process was ended.

Fol. Dic. v. 2. p. 23. Stair, v. 2. p. 326. 361. & 390.

No 45.

1678. July 30.

The EARL of HUME against HUME.

THE Earl of Hume gave in a complaint against Mr Patrick Hume, advocate, bearing, that Mr Patrick had taken right to a plea, anent Coldinghame, depending against the Earl of Hume, and therefore craved that he might be deprived, conform to the act of Parliament against Members of the College of Justice buying pleas. The defender *answered*, That, both by the law, and this statute, there was nothing to impede persons to give or take in free gift, but only prohibiting them to buy, or to purchase pleas for money, while depending; but, in this case, the defender had a disposition from Frank Stuart, his cousin-german, of Coldinghame freely, without giving any thing therefor.

THE LORDS found the defence relevant, and refused the bill.

Fol. Dic. v. 2. p. 23. Stair, v. 2. p. 643.

1680. June 23.

RUTHVEN against WEIR.

No 46.

An allegiance of *pactum de quota litis* being proponed by the debtor against an advocate assignee, the Lords inclined to sustain the nullity, though proponed by the debtor, and not by the cedent, with whom the paction was made, and they ordained the assignee to depone in presence of the cedent.

MR WILLIAM WEIR having charged Edward Ruthven for payment of a sum due by his grandfather, General Ruthven, to Patrick Ker, and assigned by him to Mr William; he suspends on this reason, that Mr William is an advocate, and a member of the College of Justice, and so neither process nor charge should be sustained at his instance upon a bought plea, contrary to the prohibitions of the act of Parliament thereanent. It was *answered*, That Mr William his assignation is after his cedent had obtained decret when there was no *lis dependens*, which the LORDS sustained. The suspender further *alleged*, That the charger's right was purchased *ex pacto de quota litis*, Mr William being advocate for his cedent, and having agreed with him for such a share of what should be decerned, and therefore neither process nor charge should be sustained at his instance upon this title, which is reprobated by the civil law, and by the custom of all civil nations. It was *answered*, That the act of Parliament prohibiting buying of pleas, being our special remeid by statute, is in place of the custom of other nations *de quota litis*. *2do*, The law doth only reprobate such pactions as to make them void as to the client who made the paction, that he is not obliged so stand to such a paction; but here the client questions not, and it is *jus tertii* to the debtor, who must either pay to the cedent, or the assignee; and if the assignee be excluded, he will be liable to the cedent, and so hath no benefit. It was *replied*, That our statute is not exclusive of questioning rights *ex quota litis*, and that such pactions being null, to discourage advocates from entering thereinto, it is competent to all parties to propone a nullity; and as the debtor might allege that the assignation was null, or false, to exclude the assignee, it could not be repelled as *jus tertii*, because he would remain debtor to the cedent; so in this case, the nullity of *pactum de quota litis* is competent to the debtor; and, therefore, he desired that the cedent's oath might be taken, whether or not there was such a paction.

THE LORDS inclined to sustain the nullity, that this assignation was procured *ex pacto de quota litis*, and found it only probable by writ or oath of the assignee, and ordained him to depone in presence of his cedent, reserving to themselves what it should operate after probation.

Fol. Dic. v. 2. p. 23. Stair, v. 2. p. 774.

* * * Fountainhall reports this case :

MR WILLIAM WEIR, advocate, against the Earl of Callander, and Edward Ruthven: The LORDS having heard the Lord Newton's report, " They find the act of Secret Council produced does not prove the allegiance founded on the act of Parliament, allowing eight years annualrent to be given down to forfeited persons; and that no other act but the act of Parliament itself can satisfy

No 46.

and prove it ; and allow the defenders yet to produce the same betwixt and Tuesday next ; and find the assignation taken from Ker by Mr William Weir is after the date of the decret, and so is not a transgression of the act of Parliament against buying of pleas by advocates. And as to *pactum de quota litis*, (which differs from the buying of a plea) before answer, ordain Mr William Weir to be examined, in presence of the persons to be condescended upon by the defender, concerning the way and manner of acquiring that right, and what he gave for it. And ordain all other persons to be condescended upon by the defender to be examined upon oath concerning the having of any writs for verifying the allegiance *scripto*. And grant diligence to the defender for that effect ; reserving to themselves to consider what the probation may operate."—
See APPENDIX.

Fountainball, v. 1. p. 104.

1683. December 20.

Sir WILLIAM PURVES, His Majesty's Solicitor, *against* Mr JAMES KEITH, and
The EARL of MARISHALL.

No 47.

The right acquired by a member of the College of Justice, who buys a plea, is not null ; but he incurs the penalties of the act of Parliament.

THE case was ; Sir William Purves long ago, disposed a comprising of Lord Gray and Lord Marishall's estates to James Allan writer to the signet, who, in the warrandice, takes him obliged not only to warrant the formality and legality of the executions of the denunciation of the apprising, but also the reality, verity and truth thereof ; thereafter Mr James Keith, also a writer, having acquired the right of this comprising from James Allan, not for his own behoof, as was thought, but for the Earl of Marishall's use, he designedly, as is affirmed, to come back upon Sir William Purves for his special warrandice fore-said, causes another appriser of Marishall and Gray's estates raise a reduction and improbation of Sir William Purves's apprising against Keith himself, as now having right thereto. And though in law after 24 years from the date of an apprising, one is not bound to produce the executions of his comprising, seeing the messenger who denounces the lands, is oft times also judge to the decret of apprising, and that they are loose papers easily exposed to perishing ; yet if they be produced, they may be improved false ; and so Mr James Keith tamely produces the executions and all ; and the two witnesses therein being examined, they depone, they do not remember that they were adhibited witnesses to that execution or knew that messenger, or were ever upon the ground of these lands ; whereon the LORDS improved the execution and found it false, (which is hard,) and so the apprising falling *in toto*, Mr James Keith recurs back upon Sir William Purves on the special conception of his warrandice, which he had inadvertently given too large. On this Sir William Purves raises a reduction of that decret of improbation on these three grounds : *imo*, That Mr James Keith had lost his right, because by the 220th act 1594, members of the Session are discharged to buy pleas ; *ita est*, there was a depending process on this when he took a

right to it from James Allan. *Answered* for Mr James Keith, *imo*, He was not then a writer, for he had deserted his employment about a year or two before : *2do*, By his acquisition, *non fecit conditionem adversarii deteriore, et durio, et* (which is the reason of law against these purchases,) for he had bought it from Mr Allan, another writer, and Sir William Purves his author was also a member of the Session, and so they were as ill with him ; *et privilegiatus contra privilegium non utitur suo privilegio* : But *3tio*, *Esto*, he were in the case of the act of Parliament, the most that could be inferred from the act is not losing of the cause, but only deprivation ; even as a beneficed person's tacks set for a longer time than is allowed by law are not declared null by the act of Parliament 1617, but only the setters are declared infamous. See 16th November 1624, Hope *contra* Craighall, No 19. p. 7943. And as the 133d act, Parliament 1584, discharging ministers to be notaries, except in testaments *non procedit annullando actum* ; even so here, all the certification adjoined to the act is only the deprivation of the buyer ; as was decided, Cuningham against Maxwell, No 41. p. 9495. ; and Richardson against Sinclair, No 43. p. 9496. See Stair, Book 1. Title 10. § 64 ; and Hope's Tractate on Reductions ; as also Vinnius, lib. 1. quæst. illust. cap. 1. who is clear *ubi lex procedit non annullando actum sed irrogando aliam pœnam*, that there the act subsists, and the *pœna* is only due. It was *answered*, Though the said act mentions only deprivation, yet the said emption must be also null, *imo*, Because the act is conceived in these terms, 'It shall not be leisome,' *id est, erit illicitum* ; if so, then it is *contra legem, et ergo ipso jure nullum* ; at least declarable to be null in a reduction : *2do*, *Loco pœna succedit damnum et interesse partis* ; which is here the whole cause and value of the plea itself : *3tio*, Vinnius *ibid.* says, *pœna nonnunquam adjicitur etiam annulationi actus*, and so it is both null and punishable. Yet the LORDS found the said act of Parliament proceeded *non annullando actum seu emptionem, sed tantum ad irrogandam pœnam*, and that the tract of the LORDS' decisions had hitherto expounded it so ; and confessed there were great inconvenience in sustaining such sales, but they could not redress it, that being work for a Parliament, and that Judges tied to the laws as they were, had not power to alter laws, *ob incommoda* urged against them ; and that arguments *ab incommodo* ought not to move Judges to recede from established laws.—*Queritur*, If the acts of Parliament discharging penal statutes, or the act of grace in March 1674, discharges also the penalty of this act against buying pleas ? *2do*, If lands in dependence be gifted, the acceptance does not seem to fall under the compass of the prohibition of this act, *3tio*, If the disposition or assignation to a *res litigiosa* be *ex causa necessaria*, as for relief of cautionry or payment of debts, it will not hinder but I may purchase them. *4to*, *Queritur*, Where lands are under plea, and one takes a disposition to them to a member of the Session in trust upon a back-bond, if this would be a violation of the act, seeing this is not a formal buying ? Yet this course would elude the act.

No 47.

Sir William Purves' *second* reason of reduction was, that this transaction made and acquired in by Mr James Keith was to the Earl of Marishall the debtor's apparent heir's behoof. This being denied, the LORDS, before answer, ordained Mr James Keith, the Earl of Marishall, and any others Sir William Purves condescended on, to be examined anent the trust.

The *third* reason of reduction was, that nothing should take away the executions of a comprising, especially *post tanti temporis intervallum*, as 26 years, except the clear liquid and positive depositions of the messenger and witnesses, denying that they were ever employed in such an act; but here they are not positive, but only as to their memory, which may easily forget after so long a time; and that it is probable they were witnesses; for they dwelt in the very next land to these lands denounced and apprised; and it is ordinary to take the witnesses from the neighbourhood. This third point was not then decided.

1684. *January 10.*—IN the case between Mr James Keith and Sir William Purves, mentioned 20th December 1683, the LORDS examined Sir George Lockhart, Sir John Dalrymple, Mr David Dewar, Mr George Bannerman, and the Earl of Marishall's other advocates, what they knew of the Earl Marishall's trusting that comprising in Mr James Keith's name, yea what they believed in their private judgment, and to whose behoof they thought it; which was to cause them depone on their fancy and opinion. But it was judged not convenient to shroud themselves under that privilege of advocates *ne teneantur secreta clientum detegere*, seeing this was the detection and expiscation of a fraudulent conveyance, which it is not an advocate's credit either to advise or conceal. Mr David Dewar discovered all, that it was for the Earl's behoof; and that he was against the acquisition of it.

Fol. Dic. v. 2. p. 24. Fountainhall, v. 1. p. 252. & 258.

1713. *December 15.*

Sir PATRICK HOME, Advocate, *against* EARL of HOME.

No 48.

Although a member of the College of Justice incurs the penalties of the act against buying pleas, the right acquired is not annulled.

IN the process of exhibition and delivery at the instance of Sir Patrick Home against the Earl of Home, the defender *alleged*, That the pursuer's title was null, as being purchased by a member of the College of Justice, after the subject was litigious, and insisted also by way of complaint upon the act 220th Parl. 14th Ja. VI.

Answered for the pursuer; The act of Parliament against buying of pleas by members of the College of Justice, does not annul such rights, but enacts a punishment in case of a contravention. viz. the loss of office, upon which the lawyers rest as sufficient to restrain the abuse intended to be corrected; and so it was decided, Richardson and L. Cranston Riddel *contra* Sinclair, No 34. p. 3210.

Replied for the defender; The statute declares, 'that it shall not be leisome,' &c. and nullum est quod fit jure prohibente l. 7. § 16. D. De pactis, l. 5. 6. C. De legibus. For though where a prohibitory act imposes a penalty upon the contravener, without declaring the deed unlawful, as if it had been conceived thus, 'If any member of the College of Justice purchase a plea, he shall tyne 'his office,' the deed contrary to the law might stand, and the penalty only be incurred; yet where a statute, as in this case, declares expressly, the deed to be unlawful, and adds a particular penalty upon the contravener, it both annuls the deed and subjects him to the penalty. If it were otherwise in this case, the design of the law would be frustrated, by making unjust acquisitions in favours of heirs, and concealing them till their death, when there is no place for depriving them of their office. Besides, the deprivation may happen *ex accidenti* to be a very great punishment to persons of eminence, who are least likely to transgress; it would be hardly a punishment to persons of employment of lesser form about the College of Justice who are most ready to be litigious. And the sanction of a law must be interpreted as it may effectually restrain all sorts of offenders.

THE LORDS repelled the objection founded on the act of Parliament anent buying of pleas by members of the College of Justice, and found that the certification therein doth not annul the right of the acquirer; and therefore sustained process at Sir Patrick's instance.

Fol. Dic. v. 2. p. 24. Forbes, MS. p. 12. 13.

* * A similar decision was pronounced 30th July 1635, Richardson against Sinclair, No 34. p. 3210. *voce* DEATH-BED.

SECT. X.

Factors and Agents purchasing Debts of their Constituents.

1632. March 28. L. LUDQUHAIRN against L. HADDO.

L. LUDQUHAIRN pursuing wrongous intromission of teinds, compeared E. Haddo, and *alleged.* that the tack, which was the title of the pursuit, was acquired by the L. Ludquhairn, he then being factor to his tutor, and so who ought to be reputed as his tutor in this, that he might do nothing in *re minoris*, to his hurt; whereby that his tack, which was of the teinds of the defender's own lands and heritage, albeit he hath acquired the same to his wife during her lifetime, and to the defender thereafter after her decease, yet it must be

No 49.

The factor named by tutors can no more take the benefit of the pupil's debts purchased by him, or of rights on the pupil's estate, than the tutor himself can.

No 49.

solely profitable to him, and not to her; and the pursuer *answering*, that it was lawful to him, albeit he had been tutor, far more when he is factor only to the tutor, to acquire this tack, wherein he hath done no wrong to the minor, to purchase the same to him, after the decease of the pursuer's wife, who is the defender's mother, and who is conjunct fiar of the most part of the lands contained in the tack: THE LORDS found, that the factor might do no more than the tutor's self in this case, and the like cases, and that the tutor might take a tack to his own wife, for her lifetime of the teinds of such lands whereof she was liferentrix, she defalking a proportion *pro rata* of the grassum paid for the tack of the minor's lands; and sustained the pursuit and tack to her for the teinds of the lands only; but for the teinds of the rest of the lands of the minor, whereof she had no liferent, the LORDS found, that the benefit of the tack in that ought to accresce to the minor, and not to the conjunct fiar, the factor's wife, nor to the factor, nor to the tutor, the minor always paying a proportion *pro rata* of the grassum of the tack, and therefore would not sustain the action libelled for the teinds of these lands.—See TUTOR AND PUPIL.

Act. Nicolson.

Alt. Stuart.

Clerk, Gibson.

Fol. Dic. v. 2. p. 24. Durie, p. 633.

1710. June 16.

MURRAY against MURRAY.

No 50.

A FACTOR is bound to communicate cases; and it was even found, that a clause in a factory, giving liberty to a factor to purchase in claims against his constituent for his own behoof, was *contra bonos mores*, and void in law.

Fol. Dic. v. 2. p. 24. Forbes.

* * * This case is No 69. p. 9214. *voce* MUTUAL CONTRACT.

1736. January 15.

CORSAN against M'GOWAN.

No 51.

It is *contra bonos mores*, and would be of dangerous consequence to allow agents to purchase in debts against their constituents, upon which footing an agent was found obliged to account for cases to his constituent's heirs and creditors.—See APPENDIX.

Fol. Dic. v. 2. p. 24.

* * * It was found, in the case of the York Buildings Company against Mackenzie, that the common agent for the sale of a bankrupt estate cannot himself purchase it, *voce* RANKING AND SALE.

SECT. XI.

Sponsiones ludicræ.—Game Debt.—Premium for procuring a Wife.—
Private Lotteries.

1676. February 9.

A. against B.

No 52.

A PURSUIT was intended for a sum of money, which the defender was obliged by his promise to pay in case he should be married; having gotten from the pursuer in the mean time a piece, which the pursuer was to loose, in case the defender should not be married.

THE LORDS sustained the pursuit; though some of their number were of the opinion, that *sponsiones ludicræ*, of the nature foresaid, ought not to be allowed.

Reporter, *Strathurd.**Fol. Dic. v. 2. p. 24. Dirleton, No 327. p. 157.*

1678. June 6. CAMPBELL against BARNES and STEWART.

No 53.

SIR WILLIAM CAMPBELL pursues John Barnes and Stewart of Blackhall, &c. to pay him 10,000 merks, on this ground, because they had promised him the said sum, if he should effectuate marriage betwixt the defender and such women; and Sir William subsumed he had done it. This is founded on the title *D. De Proxenetis*, where the law says, *Proxenetica jure licito petuntur*. But I think the pursuer must qualify relevantly, that it was by his mediation and procurement the marriage followed; for it is not sufficient to say only, *quod matrimonium est secutum*. This process moved laughter.

Fol. Dic. v. 4. p. 27. Fountainhall, v. 1. p. 1.

1687. January 13. REID against SCOT of Harden and his Lady.

No 54.

REID the mountebank pursues Scot of Harden and his Lady, for stealing away from him a little girl, called the tumbling-lassie, that danced upon his stage; and he claimed damages, and produced a contract, whereby he bought her from her mother for L. 30 Scots. But we have no slaves in Scotland, and mothers cannot sell their bairns; and physicians attested the employment of tumbling would kill her; and her joints were now grown stiff, and she declined

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to return ; though she was at least a prentice, and so could not run away from her master ; yet some cited Moses' law, that if a servant shelter himself with thee against his master's cruelty, thou shalt surely not deliver him up. The LORDS *renitenti Cancellario* assoilized Harden on the 27th of January.

Fountainhall, v. I. p. 439.

No 55.

In a pursuit for payment of a bond, *alleged* for the defender, that the money was won at dice within 24 hours, and so was not due by the act 14th Parl. 3d James VI. *Answered*, the act affords only a defence when the money is pursued for ; but here a bond of money is pursued. The Lords found it relevant *scripto* or *juramento*, that the bond was granted for money won at game within 24 hours, to make the bond fall under the act of Parliament.

In the same cause it was found, that the money lost being paid, and immediately lent back on bond, though possibly the individual species lost was not lent, this also fell under the act of Parliament.

1688. July 19. CAPTAIN STRAITON *against* The LAIRD of CRAIGMILLER.

In a pursuit at the instance of Captain Straiton against Craigmiller, for payment of a 6,000 merks bond,

Alleged for the defender ; That the money was won at game, viz. dice, within 24 hours, and so was not due by the act 14th Parl. 3d James VI.

Answered ; The said act affords only a defence against payment when the money is pursued for ; but here a bond of borrowed money is pursued.

" THE LORDS found it relevant *scripto* or *juramento*, that the bond was granted for money win at game within 24 hours, to make money fall under the act of Parliament."

Captain Straiton having deponed, that he lent the defender 4,000 merks, which was all truly borrowed money, except 36 guineas, and thereafter lent him 2000 merks more, and upon giving back the first bond, got the 6,000 merks bond delivered to him ; but refused to depone if he won back any part of the 4,000 merks before the lending of the 2,000 merks.

Alleged for the King's Advocate ; That money won at game within 24 hours, above 100 merks, is by the act of Parliament confiscated to the poor of the parish ; and the pursuer's refusing to depone *ut supra*, imports, that after the lending of 4,000 merks, he won back a part on it before lending of the other two, which is *fraudem facere legi*. And if such a thing were allowed, a gamester with 1,000 merks might win 100,000 in 24 hours, in lending it over and over again upon tickets, which would quite elude the act of Parliament, introduced for the public advantage, to refrain youth and riotous persons.

THE LORDS were clear that the 2,000 merks fell under the act of Parliament *in quantum* Captain Straiton won back of the 4,000 merks lent on bond, though the individual species lost was not lent again ; and declared they would determine so in all time coming, not only as to money won at cards, dice, and horse-races expressed in the act of Parliament, but in all other games wherein money is win and lost ; but, in respect the act was in desuetude, they would not determine so as to by-gones ; " but found the letters orderly proceeded at the pursuer's instance against the defender, except as to 31 guineas, the other five guineas but 100 merks, allowed to be won in 24 hours."

Fel. Dic. v. 2. p. 24. Harcarse, (SUMMONS.) No 937. p. 263.

1698. *January 27. February 24. and June 22.*EARL of BUCHAN *against* COCHRAN.

No 56.

THE Earl of Buchan suspended a charge upon a bond granted by him for L. 1,000 Sterling to Sir John Cochran of Ochiltree, for his assistance in procuring to the Earl an English Lady in marriage, with a fortune of L. 10,000 Sterling, on this ground, that by decree of the Lord Chancellor, the bond had been found null as *contra bonos mores*. Sir John having restricted his claim to L. 600 in name of expenses, incurred by his staying some months in London and managing Lord Buchan's affairs; the LORDS, before answer, ordained him to condescend in what manner these expenses were incurred, and whether his stay in London was on this account alone, or any other business of the Earl or his own.

*Fol. Dic. v. 4. p. 27. Fountainhall. Dalrymple.** * This case is No 82. p. 4544. *voce* FOREIGN.1740. *January 25.*NEILSON *against* BRUCE.

No 57.

IN a suspension of the charge upon a bill at the instance of an indorsee on this ground, that the bill had been granted for money won at play, offered to be proved by witnesses, the reason of suspension was repelled, unless it were offered to be proved, that the indorsee was in the knowledge of its having been granted for a game debt.

The like was found, 18th February 1741, Stewart *contra* Hislop, where a petition against an Ordinary's interlocutor, finding it not competent, against an onerous *bona fide* indorsee, to be proved by witnesses that the bill was accepted for money won at game, was refused without answers.

Fol. Dic. v. 4. p. 34. Kilkerran, (BILLS OF EXCHANGE.) No 4. p. 70.

* * C. Home reports this case :

1740. *January 29.*—The question betwixt these parties was, Whether the objection to a bill that it was granted, or came in place of another which was granted for a game-debt, was good against an onerous indorsee?

For the indorsee it was *pleaded*, That securities do not carry their causes in their face; and a fair trader, where there are no suspicious circumstances of the debtor, supposes the causes to be just, otherwise commerce would be at an end; for what man would receive indorsements to bills, if the objection of being won at play was to stop his payment? This would render all bills suspicious, especially with such cautious people as merchants, who would not fail to argue,

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that though the debtor seems to be a very good man, yet, he may love play in private, and this may be a game-debt. And if this had been the intention of the act to give so notable a blow to commerce, surely it would have been expressed, that bills, though passing into the hands of persons not privy to the wrong, should not be exempted from the statutory nullity; an exception that is included in the very nature of the thing, must be carried along in the indentment of the act of Parliament. And this is the genius of the law of England, by which this statute must be in a great measure explained. The act of the 9th Anne, was not new as to the annulling of bills and other securities granted for game-debts. The same thing was before statuted by the act 16th Cha. II. chap. 7. whereby all such securities are declared to be utterly void, and of no effect; and yet it never was imagined by the Judges in that country that this was to hurt innocent parties noways partakers of the fraud, and so it was adjudged. See Neilson's Abridgment, p. 893. and Salkild, under the word GAMING, Hussie against Jacob; which precedents, as they are founded on good sense, must be law every where.

Answered for the debtor in the bill; That by the words of the act, 'All notes, bills, &c. where the whole, or any part of the consideration of such conveyances or securities, shall be for any money, &c. won by playing at cards, dice, &c. shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever, any statute, law, or usage to the contrary thereof, in any ways, notwithstanding:' The generality of which words utterly excludes any limitation or restriction to be put upon them; the prohibition extends not only to the securities themselves, amongst which bills are specially mentioned, but also to the conveyances of such securities. And it is anxiously provided, that they shall be utterly void, &c. to all intents whatsoever, with a *non obstante* to any statute, law, or usage to the contrary. The act proceeds upon the recital, that the former laws were, by experience, found insufficient to restrain the mischief intended to be cured; and therefore goes on, not only to provide new remedies, but also to enforce those which had been formerly enacted by a more particular accuracy of expression. It is therefore in vain to plead the onerosity of the indorsation; if the security itself is originally for a play-debt, the law has made it void, and of none effect; all conveyances of it are in the same manner condemned; and if the indorsation of it to a stranger shall make it revive, the words of the law must be useless, and without a meaning; and, if this is so, arguments from inconvenience, whether real or imaginary, can have little effect; they cannot be supposed to have escaped the wisdom of the Legislature; and the law enacted must be looked upon to be the result of mature deliberation, after balancing the inconveniences on both sides. The mischiefs arising from gaming are obvious; and it could not but occur, that contrivances would be attempted to disappoint the law; these negotiations are generally carried on in a hidden way; and where securities are to be given, it was natural to imagine that the names of third

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parties might be made use of to cover the deceit. It is indeed possible that minors and onerous creditors may sometimes be unwarily imposed upon to accept such securities, not suspecting that they were originally the product of game; but this hazard was not thought of weight enough to be laid in the balance with the imminent danger which must arise from false and fictitious covers which might be made use of in play-debts. It is a maxim in law, That every one ought to know the condition of the person with whom he contracts; which must apply in the present case, at least, with equal force, where the exception against the original debt is established by a statute, which occurs in other instances where the onerosity on the part of the creditor would not be available, supposing the bill laboured under the exception of falsehood or force; and yet these would as little appear from the face of the bill as this; nor can the reason be other than this, that the bill being null *ab initio*, is thereby incapable of conveyance. See the law 2. § 1. et l. 4. § 2. De Aleatoribus. And as to the precedents quoted for the indorsee, they are prior to the statute in question, and so cannot be obtruded to limit or restrain it; they are laid upon the act of Charles II. by which the provision is not so full and ample as in the present. Besides, they are instances which prove the artifices contrived to defeat the law, which makes it reasonable to presume they have given occasion to the enlargements made by the posterior act.

THE LORDS repelled the reason of suspension founded on the game-act, in respect the bill in question was purchased by the charger for onerous causes; and that there is no evidence offered of his being in the knowledge that the bill was granted for a game-debt.

C. Home, No 142. p. 242.

1740. November 7. Sir ROBERT PRINGLE against ROBERT BIGGAR.

SIR ROBERT being creditor to Mr John Alves, used arrestment in the hands of Mr Biggar, who was debtor to Mr Alves in several bills, which were taken in the name of Mr Gilbert Pringle, as trustee for Mr Alves; and, in a forthcoming raised thereon by Sir Robert, Mr Biggar repeated a reduction of the bills upon the act 9th Anne, cap. 14. and offered to prove by Messrs Alves and Pringle's oaths, that the bills were granted for money won at game.

Answered for Sir Robert; That it was a maxim in law, that the oath of the cedent was not competent in prejudice of an onerous assignee, whether legal or voluntary, and as the statute had introduced no alteration from the common rules of law in this particular, they behoved to apply to the present case. The statute annuls bills, bonds, &c. granted for money won at play. It likewise enacts, That where a party loses at game and pays, he shall have action of repetition within three months, and that the party wining money at game, shall be obliged to answer upon oath, with respect thereto; but it no where says that such oath shall be probative against third parties, the onerous creditors of

No 58.

In a reduction of a bill on the act of the 9th of Queen Anne, it is competent to prove by the winner or his trustee, that the same was granted for money lost at game, even against onerous assignees.

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the winners of such money; See Neilson's Abridgment, p. 893. Verb. GAMING. Cornelius Neilson against Bruce. No 56. p. 9507.

Replied; That the nullity in the security granted for money won at game was general, affecting all persons whatsoever, who had or might come to have interest therein, and was indeed a *vitium reale* in such securities, introduced by statute, with a *non obstante* as to all laws and customs in the contrary thereto. As to the mean of proof, by the oath of the winner at game, the words of the third clause of the act, declaring it competent, are general, as well as the nullity itself; and by the said clause, though the winner or original creditor in the bills were not a party to the suit, they might be compelled to answer upon oath, whether or not the sum in question was won at game, which must hold stronger in this case, where the winner at game, and his trustee, are the only parties called, or that properly fell to be called in this process of reduction. If it were true, that no more was necessary for avoiding the effect of the said clause, than for a gamester when he is sued upon the act, to get a creditor of his to arrest in the pursuer's hands, and plead, that the gamester, or his trustee's oath could not be taken, it is obvious, according to that explanation, the clause could be of no effect, seeing such a remedy could never be wanting; See July 1735, Gillon, February 1731, Pringle, (See APPENDIX.)

Duplied, The rules of law are not to be altered upon imaginary inconveniencies, without statute; and as it is directed only against the winner, without speaking of onerous assignees, they are entitled to the common benefit of law; but there is really no inconvenience in the case, for if the loser be minded to take the advantage of the statute against the winner, he has no more to do but bring his action in terms thereof; and when the matter is rendered litigious, he will have the benefit of the winner's oath in prejudice of any onerous assignee, and if he is not disposed to take that benefit against the winner, but would take the advantage against an onerous assignee, there is no good reason why he should have right to such an option; for even after he has paid to the onerous assignee, still he has action against the winner.

THE LORDS found, That the reason of reduction, that the bills in question were granted for money lost at play, was probable by the oath of Gilbert Pringle and John Alves, or either of them.

Fol. Dic. v. 4. p. 33. C. Home, No 156. p. 265.

1741. February 18.

STEWART against HYSLOP.

No 59.

IN the question betwixt these parties, the LORDS found, That it was not competent to prove by witnesses, that the bill charged on was accepted for money lost at game, against an indorsee for an onerous cause, who was not privy to the wrong. See No 56. p. 9507.

Fol. Dic. v. p. 4. 34. C. Home, No 162. p. 275.

1742. January 23. MARY PROVEN against CALDER.

No 60.

A gratuitous
bill granted
*intuitu matri-
monii* sustain-
ed, although
marriage did
not follow.

CALDER, and his companion, Anderson, being one evening in an ale-house at Falkirk, and Calder, in his cups, offering to kiss the servant-maid, was desired to retire with her into another room; from whence, after a short interval, she returned to the company with a bill of L. 100 Sterling, saying, she had got it from Calder upon a promise of marriage, and gave the bill to Anderson to be kept for her. This was made the foundation of a process of exhibition and payment, at the servant-maid's instance, against these gentlemen, in which a proof being admitted before answer, the foregoing fact came out. The defender, Calder, denied that any thing criminal had passed betwixt him and the pursuer; nor was such a thing alleged on the part of the pursuer. But some of the Judges being impressed with the notion that this bill was *premium pudicitie*, and was the means made use of by Calder to debauch an innocent young woman, the defender's lawyers were obliged to state some of their defences so as to meet this suspicion. Admitting that it is highly criminal to attempt the chastity of a virtuous woman, they observed that it may be attended with very bad consequences to countenance a process of this nature, without distinction of persons; as it would infallibly furnish bad women, or those of a suspected character, with an opportunity to pick the pockets of young men, who in drunkenness, or otherways in hot blood, would be an easy prey to them. *2dly*, That though an obligation granted as a reward after the fact is committed, may be effectual in law, such as a bond granted *causa adulterii*, yet that the law does not countenance an obligation granted upon the condition of doing an unlawful act; action cannot be sustained upon such an obligation, which would be giving countenance to wickedness, and encouraging the same by a solemn judgment. And therefore, as the bill in question is supposed to have been granted, in order to entice the woman to submit to the grantor's unlawful desires, it is null as granted upon the condition of doing an unlawful act.

The first argument could only be answered by a supposition, of which there was no evidence, that Mary Proven, though a common servant in an ale-house, was a most virtuous woman, and would not have been drawn to prostitute her body without a very strong temptation. The same supposition was insisted on in answering the second argument. And indeed, upon this supposition, there is some foundation for distinguishing the present case from those where the condition of the grant is, to commit an action wicked in itself, such as murder or perjury, which ought never to be countenanced by sustaining action for the premium. But, as the yielding to a man's desires is unlawful only as to the manner, and as the temptation may be great to excuse the frailty, there appears to be a tolerable good foundation for awarding damages to the person.

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thus corrupted; and consequently, to sustain action upon a bill granted for such a cause.

"It was carried, by a narrow plurality, to repel the defences, and to find the defenders, conjunctly and severally, liable for the L. 100 Sterling."

Patrick Calder thought himself so much injured by this judgment, that he brought an appeal to the House of Lords; and the judgment was affirmed.

Rem. Dec. v. 2. No 30. p. 46.

* * * C. Home reports this case.

MARY PROVAN happening to be in a public-house with Calder and Anderson, Calder, in his cups, made love to Mary, and, as alleged, proposed marriage to her; and, upon her expressing some diffidence of him, as he had formerly deserted other girls, he, in order to give her assurances of his sincerity, granted her a bill for L. 100 Sterling; thereby meaning, as she averred, that he should pay the same in case he should not fulfil his promise of marriage, which bill she gave to Anderson, upon his promising either to return the bill to her when she should call for it, or to pay her the sum therein contained. Calder having resiled, and likewise got the bill from Anderson, Mary brought an action against them both, concluding against Anderson the depositary for exhibition and delivery of the bill; and, in the second place, in case of failzie, both against him and Calder for payment. In this process, a proof before answer was allowed of what passed at the time the bill was granted, and, in consequence thereof, several witnesses were examined.

Pleaded for Anderson, That he acknowledged the bill was put in his hands, but not with any serious purpose of being kept for the pursuer; so far from it, that, as the whole affair, from first to last, was transacted in the way of joke, it was understood by every body present, that the bill was not to be made use of, and that he ought to re-deliver the same to the granter, which accordingly he did; and that, even supposing it had been deposited in his hands in terms of the libel, he could only be liable in damages in case the bill should be found valid.

And for both the defenders, it was *urged*, That a bill being granted to the pursuer for L. 100 Sterling, and put into Anderson's hands for her behoof, were facts not relevant to be proved by witnesses; that our law was very jealous of parole evidence, and never admitted the same in matters of importance. If the pursuer had libelled a special *casus amissionis*, or lost *casu improviso*, the necessity of the thing must have made way for a proof by witnesses; but, if people give trust, they must follow the faith of those they do trust, and have no reason to complain of being denied a proof by witnesses, when it was in their power to provide themselves with better evidence. And with respect to the fact, that the pursuer trusted Anderson with the bill, it was said to fall under the act 1796, as a species of trust, and not probable otherwise than by writ or oath.

But granting the facts were true, as alleged by the pursuer, the bill is gratuitous, and so not binding, as decided, Weir against Parkhill, No 17. p. 1413.— A promise of marriage, which one is at liberty to retract next moment, may be the impulsive cause to make a deed; but surely it will never be understood an onerous cause to make the deed be considered any thing else than as a donation. Lastly, The bill was granted *intuitu matrimonii*, and consequently must fall to the ground, as *causa data, causa non secuta*, since marriage has not followed; and it can never be supported on the supposition that it was only a penalty upon Calder, to be forfeited in case he refused to implement the marriage, as penal stipulations cannot be constituted in the shape of a bill. A promise of marriage, under a penalty, is not effectual, more for the penalty than for the marriage itself; there is *locus pœnitentiæ* with regard to both, *l. 5. in fine, C. De sponsal.*, 21st January 1715, Young, No 68. p. 8473.

Answered for the pursuer, That there is nothing more frequent in our law, than to sustain a proof by witnesses, where the question is concerning the tenor of writs of importance; and that all lawyers agree in this, that *chirographum apud debitorum repertum*, is only a presumption which may be defeated by circumstances; amongst which this is one, if the writ was not given up by the creditor, but came into the debtor's hands in an unwarrantable way, as Lord Stair observes in several places. And as to the point, whether the deposition in Anderson's hands is a thing likewise probable by witnesses, the pursuer believes it is a general rule, that the delivery or receipt of moveables, of whatsoever kind, is probable by witnesses, with one exception, the borrowing or receiving of current money, which can only be proved by oath or writ of party. Upon this principle it is, that, in actions of exhibition and delivery, the having of writs of the greatest importance is probable by witnesses, see 14th February 1629, Farquhar, *voce* PROOF. And as to the observation, that the deposition in Anderson's hands is a species of trust, and therefore not probable by witnesses since the act 1696, it could have no weight; since that act has hitherto been understood only to take place where writs and securities are taken in the name of one person in trust, and for the behoof of another. It was likewise observed, that there was no evidence in the present case, tending to show the bill in question was granted in joke; nay, that the very contrary appeared from the evidence of two witnesses who were present. And as to the objection, that a donation could not be constituted by way of bill, it was answered, That though it has been found, that donations *mortis causa* cannot be constituted by way of bill, yet the decisions do not at all apply to a *donatio inter vivos*, which is the present case; for the reason why a *donatio mortis causa* is not good by way of a bill, is, because it implies a *tractum futuræ temporis*, which is inconsistent with the nature of a bill, which does not apply to a *donatio inter vivos*; but, in fact, it was granted for a truly onerous cause, viz. The pursuer's consent and promise to marry the defender Calder, which

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was promising to make over herself and her effects to her husband; and, if that is not onerous, nothing surely can be so; neither is it a clear point, that such a promise may be resiled from; but if it could, it brings the party obliged at least under a natural obligation to perform; and which, of itself, it is thought, is a sufficient onerous cause. Neither is it true that the bill was granted *intuitu matrimonii*; on the contrary, from the whole circumstances of the case, it appears to have been intended to take place in the event no marriage followed; for in case the defender had implemented his promise, the bill would have fallen back to himself *jure mariti*. In a word, the true cause of granting it was, to induce the pursuer to accept of the proposal; and as she did accordingly accept of Calder's proposal, it can never be said that the bill was either granted *sine causa*, or that it is in the case of *causa data non secuta*.

THE LORDS sustained the defence, and assoilzied.

But, upon a reclaiming petition and answers, "THE LORDS repelled the defence, and found the defenders, conjunctly and severally, liable to the pursuer for the L. 100 Sterling." See PROOF.

C. Home, No 195. p. 325.

1753. February 7.

SIR MICHAEL STEWART of Blackhall against EARL of DUNDONALD.

No 61.

A bond obliging the granter to pay 100 guineas, when the granter or his descendants should succeed to a certain Earldom, found void and null.

IN the year 1698, William Cochran of Kilmaronnock granted bond to John Stewart younger of Blackhall, of the following tenor: "I Mr William Cochran of Kilmaronnock, for an certain sum of money paid and delivered to me by Mr John Stewart younger of Blackhall, be thir presents, bind and oblige me, my heirs and successors whatsomever, to content, pay, and deliver, to the said Mr John Stewart, his heirs, executors, and assignees, the sum of 100 guineas in gold, and that immediately, so soon as I, or the heirs descending of my body, shall succeed to the dignities and estate of the Earldom of Dundonald, but longer delay, fraud, or guile."

This sum being claimed from the heir of the obliger, now become Earl of Dundonald, certain defences were made, and the cause being reported, the following objections to the bond were suggested by one of the judges, That the subject matter of the claim was a *sponsio ludicra*, which, however innocent and equal in the present case, is a sort of gaming which ought not to be encouraged, being an inlet to very bad practices; and therefore, that no process ought to be sustained upon the bond, as being *contra bonos mores*. To this it was answered, That a disposition by a remote heir of his hope of succession for a certain sum was sustained, though objected to as *pactum de hereditate viventis*, Fountainhall, 29th July 1708, Rag *contra* Brown, No 37. p. 9492. And a party having taken a gold piece, under condition to pay a greater sum if

he should marry; the LORDS, upon the condition happening, sustained process for the greater sum, Dirleton, 9th February 1676, No 52. p. 9505. Hence bargains like the present are not unlawful; and if purchasing the hope of succession from a remote heir be lawful, it cannot be unlawful to give him a sum, to receive a greater sum when he shall succeed. It is true, that if an heir pinched for money makes an unequal bargain, equity will relieve him. And if the bargain be very unequal, it will be reduced upon extortion, or fraud and circumvention, as in the case of Lord Mordaunt, *voce* USURY. But, in the present case, there is no evidence of inequality; and the parties were in such a situation as to remove all suspicion of advantage being taken by the one against the other. Accordingly, it is a rule of the English law, "That these hazardous bargains with heirs or others, are not always set aside in a court of equity, for they may be fair; and it is only upon the circumstance of fraud, or being extremely unreasonable, that they can be overthrown."

"THE LORDS found the bond in question void and null, reserving to the consideration of the Court, whether the pursuer was entitled to a repetition of the money paid, upon proving the extent thereof."

This interlocutor was obtained by the President's casting vote, and the danger of encouraging such bargains moved the plurality. The judgment can only stand upon the following footing, That it is not necessary for commerce, nor the convenience of society, to sustain action upon such *sponsiones ludicræ*. They ought to be left upon private faith, and neither be supported by an action, nor cut down, unless attended with the circumstances of fraud or extortion; in which case a party will be relieved even after performance.

Fol. Dic. v. 4. p. 34. Sel. Dec. No 39 p. 44.

*** This case is reported in the Faculty Collection :

IN the year 1698, Mr William Cochran of Kilmaronock granted a bond to Mr John Stewart, the purster's father, in the following words, viz. ' I Mr William Cochran of Kilmaronock, for a certain sum of money, payed and delivered to me, by Mr John Stewart, younger of Blackhall, by thir presents, bind oblige me, &c. to content, pay, and deliver to the said Mr John Stewart and his heirs, &c. the sum of a hundred guineas in gold, and that immediately, and so soon as I, or the heirs descending of my body, shall succeed to the dignities and estate of the earldom of Dundonald.' This bond was written by Laurence Crawford of Jordanhill, and witnessed by Sir James Smollet of Bonhill, and John Brisbane, jun. of Bishopton. At that time the estate of Dundonald stood settled upon John Lord Cochran and his heirs-male; whom failing, to his brother Mr William Cochran, the granter of the bond, and John had then two sons alive.

The pursuer, in right of his father, brought his action upon this bond, alleging, that the condition of it had been purified in the 1725, when the succes-

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sion to the estate and dignities of Dundonald opened to the defender's father, who was the son of Kilmaronock.

The defender offered sundry special defences; but when the case was reported to the Lords, it occurred to them, that the first question was, whether action could lie upon such a bond?

Upon that point, *pleaded* for the defender, That this was *pactum de hæreditate viventis*, and *contra bonos mores*; and, as a precedent in point, was mentioned the case of Abercrombie against Peterborough, 13th July 1745, *voce* USURY, where the Lords restricted the pursuer's demand to the sum advanced, with interest from the time of the advancements. The like judgment was given in two similar cases in England, viz. *Berny versus Pit*, (Vernon, vol. II. fol. 14.) and *Wiseman versus Beeche*, (Vernon, vol. II. fol. 121.)

Replied for the pursuer, That the bond in question is properly a contract *do ut des*, and is of a similar nature with bills of bottomry and insurances, which are favourites of the law. That, *imo*, The bargain had all the appearances of being a fair one; for, although the sum paid cannot now be proved, yet, at the date of the bond, Kilmaronock's chance of succession was so distant and uncertain, that a very small sum advanced was equal to 100 guineas to be returned on that event. Besides, Kilmaronock was no extravagant young heir, seeking to borrow money at any rate. Both he and Mr Stewart were equally above all suspicion of imposing, or of being imposed upon; and the witnesses were gentlemen, who would not have set their name to any thing usurious or unfair. The case of Dr Abercrombie was entirely different; for there advantage was taken of Lord Mordaunt's circumstances, to extort from him a bond, by which four times the sum received was to be paid back, if he, a young man, should outlive his grandfather, a man of 80 years of age. This was plainly an usurious and deceitful loan, and such as would have fallen under the *Senatusconsultum Macedonianum*.

In the *next* place, the condition of the bargain was no way unlawful, or *contra bonos mores*. The maxims and reasons of the civil law concerning *pacta de hæreditate viventis*, are by modern laws exploded. The *Majoratus* in Spain, *les institutions contractuelles* in France, entails in England, and tailzies in Scotland, are no other than *pacta de hæreditate viventis*. Purchases of liferents, annuities upon lives, are daily bargains. In such annuities one may insert the name of a father, nay, of the King himself. Yet, in none of all these cases doth the law suppose a *votum desiderandæ et captandæ mortis alienæ*. The law is above such suspicions. Lord Stair, l. 3. tit. 8. § 28. says, 'All pactions and contracts, in relation to the heritage of persons living, are valid and ordinary in contracts of marriage,' &c. See the case of Aikenhead against Bothwell, No 36. p. 9491.; see also No 52. p. 9505.

Triplied for the defender; That as to the fairness of the bargain, it does not enter the case, seeing the sum advanced does not appear; and though it did, no injustice is done if the pursuer get repetition to that extent. It was not upon

that footing, or upon the circumstances of the parties, that the judgment was founded in Abercrombie's case, but entirely upon the natural turpitude of such bargains, and upon the danger of admitting them in any shape. Insurances, bills of bottomry, annuities on lives, purchases of liferent, tailzies, and other settlements, are introduced in favour of commerce, or for the convenience of mankind, by regulating successions. But no argument of convenience or expediency can be brought to support wagers of this kind, which generally import a *turpe votum* upon one side, a desire to take an undue advantage upon the other, and, at best, folly and rashness upon both.

"THE LORDS found the bond in question void and null, reserving to the consideration of the Court, whether the pursuer should have repaid to him the money paid for the same, upon proving the extent thereof."

Act. H. Home, W. Stewart. Alt. Ferguson. Reporter, Lord Elchies. Clerk, Kirkpatrick.
S. Fac. Col. No 61. p. 93.

1760. August 8.

SIR WILLIAM MAXWELL of Monrieth against MR CHARLES MURRAY.

SIR WILLIAM MAXWELL of Monrieth, in his minority, granted bond to Charles Murray of Stanhope, acknowledging the receipt 'of a large diamond ring, with a fine picture ring, in value upwards of L. 40 Sterling, and obliging himself to pay to the said Charles Murray for these rings, 150 guineas at the first term after his marriage or death, which of these terms should first happen, with the interest after the term of payment;' and, three years after he became major he granted a formal ratification of the same.

Sir William, in the year 1760, brought a reduction of this bond, upon the following grounds; 1mo, That it was a *sponsio ludicra*, and in effect a game-debt; 2do, That the bargain was usurious, an exorbitant advantage being taken of him under colour of the uncertainty of the terms of payment; and therefore, that it ought not in equity to be sustained for more than the value as estimated by the parties, viz. L. 40 and interest. Answered to the first, That this is obviously a commercial bargain, and by no means a *sponsio ludicra*. Here is a *merx et pretium* both ascertained. The quantity of the price is indeed made to depend upon future events, but no lawyer says that this is an objection to any bargain. Even bargains of pure chance are indulged in commercial dealings, witness a *jactus retis* mentioned by all the Roman lawyers. Upon that foundation stand policies of insurance, bottomry contracts, the *pecunia trajectitia*, and a thousand others which daily occur in commerce. To the second it was answered, That this case must be distinguished from extortion, where a young heir, or any man pinched for want of money, must have it at any rate, and where the lender, taking advantage of the borrower's necessity, imposes upon him hard and rigorous conditions. This is not the present case. Sir William was under

No 62.

A minor bought rings worth L. 40, promising to pay 150 guineas for them at his marriage or death. This obligation he ratified when major. Found valid.

No 62.

no necessity to have the rings; nor was he in circumstances to put it in any man's power to oppress him with rigorous conditions. The terms of the bargain were altogether voluntary on his part; and, supposing them unequal, that circumstance is not relevant to void a lawful bargain. But they were not unequal. Sir William is possessed of an entailed estate, and his creditors cannot draw a shilling but what they make effectual during his life. The defender, in particular, could have no hopes of his payment but by Sir William's marriage, which is one of the terms of payment of the bond. And even though Sir William is married, yet, if he die soon, the defender has little hopes of his money. He does not expect to recover even the L. 40, to which the rings were estimated.

"The reasons of reduction were repelled, and the defender was assolizied."

Sel. Dec. No 168. p. 129.

1767. March 5.

JOHN M'COULL, Shoemaker in Edinburgh, against ALEXANDER BRAIDWOOD, Shoemaker there.

No 63.

A bill for L. 8,
a part of
which sum
had been won
at play, was
found null.

M'COULL having charged Braidwood for payment of a bill of L. 8 Sterling, Braidwood suspended on this ground, That the bill was granted for money won at play, and therefore null by the said statute. M'Coull, in a condescendence, averred, that the greatest part of it was for furnishings of different kinds, but acknowledged, that having kept a sort of public house, between 30s. and 40s. of it was for liquor, won by him at draughts from the suspender, during the course of 18 months, and at many sittings.

THE LORD GARDENSTONE Ordinary, upon advising this condescendence, "sustained the reason of suspension, founded on the act of Queen Anne, That the bill charged on was in part granted for a game-debt; found the said bill void, and suspended the letters *simpliciter*, without prejudice of any action at the charger's instance, for payment of any furnishings, or advances by him, separate from the game-debt, as accords."

The suspender reclaimed, and *contended*, That the act was not meant to restrain from play for amusement, and for trifles. It is entitled, 'An act against excessive and deceitful gaming.' What is excessive gaming, is no where expressly said in the act, but may be collected from that clause which allows recovering of any sum above L. 10 lost at one sitting. This seems a key to the spirit of the whole statute, and particularly to warrant a correspondent limitation of the general clause, respecting securities, founded on by the suspender.

2do, It is submitted, whether the present case does at all fall under the act. In the common case there is no value given for money lost at play. But here the suspender got liquor, and as the charger lost fully as much as he, the sum charged for was really no more than the suspender's club, which he ought at any rate to pay.

3tio, The bill ought at least to be sustained to the amount of the advances and furnishings made by the charger. No 63.

Answered to the first; The statute only allows recovery where the sum amounts to L. 10, yet it has declared all securities void, whatever sum they may be granted for; and there are very solid grounds for the distinction.

The law allows to play for any sum under L. 10. provided it be paid in ready money, presuming that those who are possessed of so much cash cannot suffer by losing that sum. But, if securities were allowed for any sum at all, they might be multiplied without end, which would be very dangerous, especially to the lower class of people.

To the *second*; The statute voids all securities, granted either for money, or other valuable thing won by gaming; nor is there any real difference whether this bill was granted for money lost at play, or the price of liquor lost at play.

To the *third*; The statute declares the security null, where either the whole, or any part of the consideration of such securities, is for money won at play, and sufficient justice is done the suspender, by the reservation in the Lord Ordinary's interlocutor.

"THE LORDS adhered."

For the Charger, *Wight*.

For the Suspender, *Armstrong*.

A. R.

Fol. Dic. v. 4. p. 34. Fac. Col. No 61. p. 105.

1770. February 14.

JEAN THOMSON, Spouse to George Dallas, Writer in Edinburgh, against HEW MACKAILE, Writer in Edinburgh.

HEW and WALTER MACKAILE, father and son, on the 16th March 1769, granted an obligation addressed to George Dallas, which, after a long preamble, subsuming the intention, which was to provide a suitable wife for the son, concludes thus: 'I hereby promise to pay to you, or order, at your house in Edinburgh, three days after date, for behoof of Mrs Dallas, your spouse, 21s. Sterling money, for the trouble and time she hath hitherto bestowed in our business with- in mentioned; as also L. 9: 9s. money foresaid, three days after the date of the contract of marriage that shall, by the providence of God, be voluntarily entered into and signed and delivered betwixt our son and a young gentlewoman, described as within.

(Signed) HEW MACKAILE.

WALTER MACKAILE."

By the assiduity and management of Dallas and his wife, a marriage was accordingly brought about betwixt Walter Mackaile and a young woman, not unsuitable in rank, but who had no fortune, and without the consent and approbation of her own parents. The pursuer then brought an action upon the obligation before the Magistrates of Edinburgh, who at first refused to sustain it;

No 64.

A marriage-brokerage obligation contra bonos mores, and not actionable.

No 64.

but afterwards, in respect that the marriage had taken place from the suggestion and recommendation of Dallas's wife, and that the person was a virtuous young gentlewoman of good reputation and character, found the defender liable.

The cause having been brought into the Court by advocacy, it was

Pleaded for the defender, That this was an illicit contract, a *pactum turpe et contra bonos mores*, and upon which no action could lie. For,

1mo, In order to constitute what is called in law a *turpe pactum*, or *contra bonos mores*, it was not necessary that there should be any natural depravity or inherent turpitude in the transaction; the legal idea of the phrase implied no more than that the contract was prohibited by law, or discouraged by the Judge, on account of its dangerous or pernicious effects on society. Of this there were many instances among the Romans; as the *pacta successoria*, or *pacta de hereditate viventis*; the *pacta de lite*, and the *pactum medici cum aegroto*; and, in this country, the purchase of depending pleas by a member of Court, being productive of bad consequences, was prohibited by the Legislature.

The contract in the present instance was still more deserving of being reprobated. To sustain an action of this nature would give encouragement to interested and designing men to earn an infamous profit, by destroying the peace of families, by rendering children undutiful to their parents, and leading them to ruin unperceived till it was past redress.

2do, By the civil law, a stipulated reward of this nature, which was termed *proxeneticum*, was not recoverable in the ordinary course of procedure; and it appears even to have been regarded in the same light as a *pactum de lite*, and of course reprobated by law. If such rewards were recoverable at all, it could only be by the *cognitio extraordinaria*; and as this took place only where there was no stipulation express or implied, it proved that such demands had no foundation on contract or agreement. Such appears to have been the doctrine in the earlier periods of the Roman law. L. 1. D. De proxenet. Paratit. ad l. 50. tit. 14. D. L. 2. 3. D. De proxenet. L. 1. §. 7. 12. D. De extraord. cognit. And though, by the later laws of the empire, stipulations for the *proxeneticum* were authorised, they were laid under such restrictions as to guard against their dangerous consequences. L. 6. C. De sponsalibus, &c.

3tio, Though there had been few decisions in this country that bore directly upon the point, the principle of such as had occurred was directly adverse to the legality of such a stipulation. 9th Feb. 1676, No 52. p. 9505; Sir Michael Stewart *contra* Earl of Dundonald, No 61. p. 9514; and in one precisely upon this point, Sir William Campbell *contra* Banes and Stewart, No 53. p. 9505., though the question was not determined, very little countenance seems to have been given to the action.

In the law of England this subject was well known; and marriage brokerage bonds, as they were called, not only discountenanced and set aside, but the procurement of marriages in that way held to be an indictable offence. Jacob's Law Dict. *voce* Marriage; Bacon's Abridgement, tit. Marriage and Divorce;

Abridgement of Cases in Equity, p. 90.; 1. Vernon, 402.; 2. Vernon, 652.; Shower's Cases in Parliament, p. 76. Executors of Thomas Thynne *versus* Potter; and in the case of Earl Powis, the argument never was put upon the ground of there being a marriage brokage contract; which, if there had been any foundation for it, would not have been overlooked.

Answered for the pursuer :

1mo, That marriage ought to be free, was a proposition which admitted not of dispute; and that whatever tended to destroy that freedom ought to be avoided. But when it was considered from what quarter the liberty of choice and freedom were in danger, and what sort of interposition was most dissonant to that principle, an obvious distinction occurred, favourable to the doctrine the pursuer maintained. Wherever a father, guardians, brother, or other near relation, who were supposed to have a natural influence and authority, stipulated a reward, either for giving their consent, or for influencing or procuring a marriage; such agreement, as it was truly destructive to the freedom of choice and inclination, might very properly, as it was a betraying of trust, be called a *turpe pactum*, and as *contra bonos mores* declared void. But the case was very different here; for the pursuer had no connection with the young lady, or with either of the parties; she had no authority over either, nor any farther influence than that of mere advice and commendation. As she was not therefore in a situation to exert any improper or undue means upon the inclinations of either party, so far from putting any restraint upon their choice, she in fact contributed to the indulgence of their mutual wishes.

There were perhaps very few marriages which were not in some measure brought about by the intervention of third parties; and if it be *contra bonos mores* to interpose when a reward was promised, it must, upon the defender's principles of the infringement of freedom, be equally the same, when the interpositions proceeded merely from friendly motives; so that the argument maintained, by necessarily going too far, and leading into a manifest absurdity, was truly devoid of just or legal foundation.

2do, The determination of the question was affected by no precedent in the law of this country, or decision of the Court. The Roman law was clear on this head, 'Proxenetica jure licito petuntur;' and as that law had always been considered as a part of our own system, it was more to be regarded than the laws of our neighbouring country, which with us had certainly no authority. In judging of this case, the Court was bound by the laws of no nation whatever; as the question, being one of general and natural law, fell to be determined by those principles which were most favourable to matrimony, and most conducive to the happiness of mankind.

Upon advising informations, the following judgment was given :

" Find, That the offer undertaken by the pursuer, in terms of the missive pursued on, dated 16th March 1767, was *contra bonos mores*; and therefore find,

No 64. that no action lies upon the said missive; assoilzies the defender, and decerns; and finds expences due."

Lord Ordinary, *Kames.*

For Thomson, *James Grant.*

Clerk, *Kirkpatrick.*

For Mackaile, *Geo. Fergusson.*

R. H.

Fol. Dic. v. 4. p. 27. Fac. Col. No 21. p. 51.

1774. July 14.

WILLIAM MAXWELL of Dalswinton *against* ALEXANDER BLAIR of Dunrod, and the TRUSTEES appointed by the deceased HUGH BLAIR of Dunrod, Father to the said ALEXANDER.

No 65.

In a question relative to the validity of a bill, granted as the amount of a wages lost upon a horse-race, the Lords found, that the 14th act, Parliament 1621, relative to game debts, was not in desuetude.

THE statute 14th, Parliament 1621, *inter alia*, enacts, That, wherever any person wins above 100 merks, within 24 hours, upon cards, dice, or horse-racing, the surplus shall, within 24 hours thereafter, be consigned in the hands of the Kirk-Treasurer, if in Edinburgh, or of the Kirk-Session in the country, to be applied for the use of the poor.

In a question between these parties, relative to the payment of a bill that was granted to the pursuer, by the deceased Hugh Blair, in consequence of his having lost a bett of L. 200 Sterling upon this feat of horsemanship, which of them should ride in the shortest time from Dumfries to Kirkcudbright?—the pursuer having *contended*, That betts of this kind were not illegal, the point deliberated upon by the Court was, Whether or not the act 1621 was in desuetude? And, for showing that it was not, reference was made to the decision in the case of Sir Scipio Hill, 9th February 1711, *voce* POOR.

The Court "found, that the 14th act, Parliament 1621, is not in desuetude; and ordain the Clerk of this process to intimate to the Kirk-Sessions of Dumfries, Kirkcudbright, and Kelton, that they may appear for their interest in this cause; and, this intimation being made, remit to the Lord Ordinary to proceed in the cause, and to do therein as he shall see just."

— Act. *Crosbie.*

Alt. *Wight.*

Clerk, *Kirkpatrick.*

Fol. Dic. v. 4. p. 34. Fac. Col. No 126. p. 338.

* * See the competition between the Kirk Sessions, decided 15th June 1775, in favour of the poor of the parish of Dumfries, *voce* POOR.

No 66.

1776. December 3.

HOPE *against* TWEEDIE.

THE LORDS sustained action for a wager of a pipe of Port wine between two Gentlemen, to be paid to him who should walk first to Edinburgh from a cer-

tain place in the country ; though they assoilzied on the circumstances of the case, from which a presumption arose, that the wager was not seriously laid.—
See APPENDIX.

No 66.

Fol. Dic. v. 4. p. 34.

1787. January 26.

EDWARD BRUCE, Writer to the Signet, against WALTER ROSS, Writer to the Signet.

MR BRUCE and Mr ROSS laid a bet of L. 50, respecting the election of a Member of Parliament for the Eastern District of Fife Boroughs, the latter being the agent of one of the candidates. The former thinking he had gained the wager, demanded the money ; and, upon the latter refusing payment, brought an action against him.

No 67.
A wager respecting the election of a Member of Parliament, found not actionable. Affirmed on appeal.

The pursuer *pleaded*, A wager is a bargain neither immoral in itself, nor reprobated by any statute. Gaming with cards or dice for money is, at least, of as hurtful consequence as wagering ; but that it is not contrary to law, is evident from the act 1621, cap. 14. which, without prohibiting, imposes only certain restraints on that mode of gaming. Those restraints, however, do not affect wagers, the lawfulness of which is evinced by Sir George M'Kenzie's Observations on the same statute. This contract, therefore, is a legal ground of action ; and so, in a case 9th February 1676, No 52. p. 9505. reported by Dirleton, the Court found.

The defender stated nothing with respect to the competency of the action ; his argument being confined to the question of fact, Whether the wager was lost or won by him. But

The cause being reported by the Lord Ordinary, the Court seemed to be unanimous in the opinion, that action ought not to be sustained. The Judges, in general, regarded a wager as in no case a legal ground of action ; while some, who thought differently, were, nevertheless, disposed to deny action in this particular case, from the idea, that political operations were a peculiarly improper subject of wagering.

On this ground, therefore ; for, on the matter of fact, the opinion of the Court appeared to be in favour of the pursuer,

“ THE LORDS dismissed the action, and assoilzied the defender.”

A reclaiming petition against this judgment was refused without answers.

Reporter, Lord Ankerville.

Act. Wight.

Alt. Ipse.

Clerk, Orme.

S.

Fol. Dic. v. 4. p. 34. Fac. Col. No 301. p. 465.

No 67.

* * * This case was appealed.—The House of Lords, 14th April 1788, “ORDERED and ADJUDGED, that the appeal be dismissed, and the interlocutors complained of be affirmed.”

1796. July 7.

FRASER *against* SPROTT.

No 68.

FRASER, a jeweller and hardware merchant, having advertised a scheme of a lottery, for disposing of his goods, the Procurator-fiscal of the City of Edinburgh applied to the Magistrates for an interdict against him, upon the ground of such lotteries being declared nuisances by law, particularly by 27th George III. cap. 1. § 2. Urged in defence, That the remedy prescribed by the statute was confined to the Courts of Westminster Hall, and that we have no common law against making sales in this manner. The Magistrates granted the interdict. On a bill of advocation being reported to the Court, the Lords remitted to the Ordinary to pass the bill, to the effect of trying the question; and, in the meantime, continued the interdict.—See APPENDIX.

Fol. Dic. v. 4. p. 34.

1799. May 15.

SAMUEL WORDSWORTH *against* JOHN PETTIGREW.

No 69.
Wagers are
not action-
able.

SAMUEL WORDSWORTH obtained decree in absence against John Pettigrew for L. 5 Sterling, as the amount of a wager, that a particular mare would trot 17 miles within an hour.

In a suspension, Pettigrew, besides denying that he had taken the bet, contended that action does not lie for claims of this sort.

The Court, upon a verbal report by Lord Probationer Bannatyne, were unanimously of this opinion. This was not founded on the statutes against gaming, but on common law. Courts of Justice (it was observed) were instituted to enforce the rights of parties arising from serious transactions, and can pay no regard *sponsionibus ludicris*; as to money gained or lost, on which *melior est conditio possidentis*; 26th January 1787, Bruce against Ross, No 67. p. 9523. affirmed on appeal.

The letters were suspended *simpliciter*.

D. D.

Fac. Col. No 123. p. 281.

S E C T. XII.

Premium for procuring an office. Bond among Electors. Money for bribing Electors. Payment of an Elector's Debts in a political contest.

1759. February 9. KATHARINE YOUNG *against* GAVIN THOMSON.

MR KER, being Member of Parliament for Edinburgh, and consequently a man of weight, procured for his wife's brother, Gavin Thomson, an office in the excise, with a salary of L. 35 yearly, till he should be better provided for; but took from him an obligation in the following terms, 22d September 1751, 'I Gavin Thomson, permit clerk, seeing that I stand greatly obliged to Mr Ker for the office I enjoy, I bind and oblige me so soon as I receive a yearly free salary of L. 50 Sterling in the excise, to pay out of the same to Isobel Young, my aunt, or to any other he shall appoint, secluding their heirs and assignees, the sum of L. 10 Sterling yearly.' This obligation being put in suit, it was *objected*, That the Court ought not to sustain action upon it, because it is *contra bonos mores* for a man to take a premium to use his interest. One's interest ought always to be applied in favour of the deserving, and not to hire it out for gain. It was generally the opinion of the Court, that if Mr Ker had taken the sum payable to himself, the paction would have been *contra bonos mores*; but not where it is taken by him payable to a friend or relation, such as Mrs Young, who was his wife's aunt. It was *answered*, That this distinction opens a wide door for defeating the objection altogether; it is but taking the obligation in name of a confident, or some person under authority. This is the present case. Mrs Young's claim depends entirely on the will of Mr Ker; because he, when he pleases, can appoint the pension to be paid to another. *2do*, If the using one's interest for advancing the fortune of another ought to be gratuitous, like lending one's credit to obtain money to another, it is equally *contra bonos mores* to take a gratification, whether to himself, to his son, to his wife, or to his wife's aunt; for every gratification of this kind is equally averse to the true spirit of benevolence, and tends equally to make a man misapply his interest, by engaging for the least worthy, who have no other means but such douceurs to recommend themselves. THE COURT notwithstanding sustained process, and decerned.

Eol. Dic. v. 4. p. 28. Sel. Dec. No 152. p. 208.

No 70.
Obligation taken by one who procured an office for another, to pay an annuity to the officer's aunt, sustained.

No 70.

*** This case is reported in the Faculty Collection :

DUNCAN CAMPBELL, Captain of the city-guard at Edinburgh, granted an obligation to Mr Ker, Member of Parliament for this city, to pay, while he enjoyed his office of Captain of the guard, and of keeper of the wardrobe in Holyroodhouse, to Gavin Thomson, permit-clerk of excise, L. 19 : 10s. yearly, or such lesser sum as, when added to his salary in the excise, amounted to L. 50 yearly ; and Gavin Thomson became bound to the same Mr Ker, to pay yearly to Isabel Young, his aunt, who was likewise aunt-in-law to Mr Ker, or to any person he should name, L. 10 Sterling, while his income amounted to L. 50, as above, or exceeded it, by his being preferred in the excise.

Campbell raised a reduction of the first obligation against Thomson, and Isabel Young charged Thomson for payment of the L. 10 yearly on the second.

Campbell's obligation was reduced, as being *contra bonos mores* ; and Thomson having suspended Young's charge, *pleaded*, That his obligation was a part of the transaction with Campbell, and was equally *contra bonos mores*, therefore null.

Both obligations were bribes, which Mr Ker took from Campbell and Thomson, for his interest used in procuring them offices, or keeping them in office, and which it was optional to him to bestow on Isabel Young, or any person he should name.

The ruinous tendency of the sale of offices to the state, renders it unlawful ; and such transactions are prohibited, and subjected to penalties, by the law of England, 12th Richard II. c. 2. ; and 6th Edward VI. c. 16.

Pleaded for Young ; There is no statute in Scotland prohibiting the sale of offices ; on the contrary, offices in the army, and many civil offices, are sold publicly, and some have been adjudged saleable by this Court. Neither is it clear, that such sales have a bad tendency.

But this transaction is not a sale of an office ; for Mr Ker had it not in his power, either to confer an office in the excise on Thomson, or deprive him of one. He stipulated nothing for himself ; he only burdened Thomson, whom he had favoured by using his interest, with L. 10 yearly, for the maintenance of his own aunt, to do which he was bound by a natural obligation. It was a most pious transaction on the part of Mr Ker ; and so far from being *contra bonos mores*, that it is confirmed by the practice of the courts of England, in cases not so urgent as the present ; Hill. 1693, Symonds *versus* Gibson, 2d Vern. 308. ; Laurence *versus* Braiser, 1st Chan. case 72. noy. 142.

" THE LORDS found Thomson liable for the L. 10."

Act. *And. Pringle.*Alt. *J. Dalrymple.*Clerk, *Pringle.**J. C.**Fac. Col. No 167. p. 297.*

1775. *March 1.*JOHN PATERSON and Others, *against* The MAGISTRATES and TOWN-COUNCIL of Stirling, elected at Michaelmas 1773.

No 71.

The effect of a bond of association entered into among three leading men in the politics of a borough, to unite and perpetuate their interests, found to annul a subsequent election of magistrates, as brought about by the undue influence of that association.

IN November 1773, a petition and complaint was presented to this Court, under the authority of the statute of the 16th of the late King, for regulating the elections in Scotland, at the instance of John Paterson deacon of the weavers, and others, as constituent members of the town-council of Stirling, elected at Michaelmas 1773, setting forth, That James Alexander, then elected provost, Henry Jaffray, counsellor, and James Burd, bailie, have, since the year 1768, managed the elections and affairs of the burgh according to their pleasure; and that, being resolved to support their influence, they had entered into a most illegal and dangerous association in 1772, which they executed in the form of mutual bonds, whereby they became bound to one another, that no person should be brought into council that was not approved of by all the three, and without their being assured that such persons would stand by and support their interest: That each of the three should name a certain number of friends to be brought in at every election: That no office or place of trust or profit within the burgh should be bestowed on any person but with their joint consent; and that they should maintain this engagement during their lives. That, agreeably to this bond of association, the council of the town of Stirling had, by degrees, been modelled and framed to the pleasure of the three bondsmen, and the burgh entirely brought under subjection to them; and, therefore, the complaint prayed the Court to grant diligence for recovering the said bonds, and to find the same *contra bonos mores*, unwarrantable, and illegal; and to reduce and make void the pretended election of magistrates and council made at Michaelmas then last.

Answers were put in to the complaint, in which Alexander, Jaffray, and Burd, admitted, that they entered into a bond of association nearly in the terms specified in the complaint; but they *alleged*, That they never did, and never had occasion to give it any effect in election matters; and that, at the election 1773, it was disregarded, and soon after destroyed: This bond was intended to strengthen a friendship that had subsisted for some time, and they never made a bad or improper use of it in any respect whatever. The other respondents averred, that they never heard of the bond till after the last Michaelmas election; and that none of them felt any influence at the last, or any other election, which they could, after hearing of the bond, impute to it.

The bondsmen, Mr M'Killop, a writer, in Stirling, and others, were examined upon a diligence granted by the Court, and from their depositions it appeared, that the bond, in consequence of a difference that rose amongst the bondsmen at the last election, had been destroyed; but the tenor of it was substantiated by the bondsmen themselves, and sworn to by M'Killop and others.

No 71.

The complainers having been ordained to give in a condescence of the facts they offered to prove, they accordingly did exhibit a condescence, to which the bondsmen and others made answers, in which they disputed the relevancy of the condescence, as it was not offered to be proved that any of the respondents, other than the bondsmen, had any knowledge of the bond; and therefore they insisted, that, though it might affect the election of the bondsmen themselves, yet it could not strike against the election of the rest of the respondents.

The complainers, in replies, *inter alia*, insisted, That, if the provost alone be disqualified, the election cannot subsist, agreeably to the opinion of the Court in the case of Inverkeithing election, 11th March 1761, (*see APPENDIX*). Further, *2do*, That this bond does not merely disqualify the parties who subscribed it, but affords a good reason for reducing the whole election, even of those who had not subscribed the bond, as being brought about by undue influence, as was found by the House of Lords in 1734, in the case of Kinghorn. But, *3tio*, Though they might rest their cause upon the proof as it stands, as the bond, though subscribed but by three, ought, for the reasons given, to annul the election even of those who did not subscribe it; yet they are in condition to prove, that both at Michaelmas election 1772, and at Michaelmas election 1773, the persons brought into the council as merchant-counsellors, and deacons, were informed, that the interest of Messrs Alexander, Burd, and Jaffray stood upon one bottom, and were taken bound, by a promise previous to their election, to support that interest. Now, if the persons brought into the council were taken bound to support the joint interest of these three men, and if these three were bound to one another by a bond, as above mentioned, the case is evidently the same as if all the counsellors had been parties to the bond. The replies were followed by duplies.

THE COURT allowed a proof, which having been led upon both sides, after advising the depositions and memorials, and hearing parties procurators, the whole of the Judges expressed the highest disapprobation of the three bondsmen for having entered into such an illegal and unwarrantable bond of association. The only difference in opinion was as to the effect it ought to have upon the election in question, which the plurality agreed should operate no less than a total avoidance thereof; but, before signing the decree, the respondents, for the first time, moved the Court upon the following plea in bar of the whole complaint:

That the complaint being founded upon the statute of the 16th of the late King, which authorises a minority to apply for redress of wrongs committed by the majority: That, in the election complained of, there was no minority, the whole having passed without a dissenting voice; and, therefore, no complaint could be made under the statute: That the complainers were barred, *personali exceptione*; and that it was without example to allow a party *allegare suam turpitudinem*, and upon such grounds to challenge his own acts and deeds.

The complainers, in answer, stated, that it was obviously the intention of the statute to give a remedy against every wrong done in matters of election, whether committed by a majority, or acquiesced in by all concerned. It cannot be supposed that any one or more of the members of a meeting who had concurred in the several steps of an election, not knowing of any latent wrong or ground of challenge at the time of such election, should be barred from bringing a complaint upon any relevant ground, when, *de recenti*, they came to be informed of such cause of complaint. Such a doctrine is adverse to every idea of law and equity; and various instances have occurred where personal objections, such as here moved, to the title of complainers, have been overruled; and it would be absurd to confine redress only to wrongs where the parties have divided into majority and minority, and to deny relief in all other circumstances.

The judgment pronounced was,

“ Repel the objections to the title of the complainers; and find it proved, That James Alexander, Henry Jaffray, and James Burd, entered into the bonds or obligations mentioned in the petition or complaint; and find, that the said bonds were illegal, unwarrantable, *et contra bonos mores*, and that the same had an undue influence on the election of the magistrates and counsellors of the burgh of Stirling made at Michaelmas 1772, and also upon the election of magistrates and counsellors made at Michaelmas 1773, the election now complained of; the LORDS therefore find the said election at Michaelmas 1773 null and void, and reduce and declare accordingly; and find the complainers entitled to full costs of suit.”

Act. *Ilay Campbell, M^rLaurin.*
General Dundas.

Alt. *M^rQueen, L. Advocate, Dean of Faculty, Solicitor-*
Clerk, *Gibson.*

THE COURT having afterward taken into consideration how far the said James Alexander, Henry Jaffray, and James Burd, the three bondsmen, were liable to censure for having entered into such an association,

Their counsel represented, That as, in the complaint the said persons were no otherwise parties than as members of the town-council of Stirling, therefore no procedure could be had against them under the said complaint, personally; and moved that, at any rate, they might be heard by counsel thereupon.

THE COURT, of the same date with the former, pronounced this other interlocutor: “ THE LORDS having heard what is above represented, they supersede the consideration of this matter till the third sederunt day of June next, when they declare they will hear counsel thereon; but, in the mean time, allow the decree now pronounced to be extracted.”

These two interlocutors were affirmed in the House of Lords, 8th November 1775.

Fol. Dic. v. 4. p. 29. Fac. Col. No 166. p. 59.

1778. November 28.†

Colonel ARCHIBALD CAMPBELL and his Trustees, *against* ROBERT SCOTLAND.

No 72.

A party who had received money without receipt, for the purposes of a canvas for election of a member of Parliament, found not liable to account.

IN 1775, Colonel Archibald Campbell appeared as candidate to represent, in the ensuing Parliament, the district of burghs, of which Dunfermling is one, and employed Robert Scotland, a shop-keeper in that burgh, as his agent for managing his political interest there. A large gratuity was agreed to be given to Scotland for his trouble; and, in consequence of his undertaking this business, money was, from time to time, put into his hands by different persons for behoof of Colonel Campbell, to the amount of about L. 3200. No receipt or voucher was given by him for any part of this money.

It was afterwards suspected by Colonel Campbell and his friends, that Scotland had betrayed his interest in the burgh, and favoured the other party. Colonel Campbell himself having gone abroad, and named trustees for managing all his affairs in this country, Scotland was required by them to show his accounts for the money he had received; and, upon his declining to comply, the trustees brought an action of count and reckoning against him, in their own name, and that of their constituent, and insisted that he should, in the first place, be ordained to produce his accompts. Scotland acknowledged his having received the money; but

Pleaded in defence against this action; As the defender's acknowledgment is the only evidence of his having received the money, it must be taken subject to the intrinsic qualities under which he makes it, viz. that he got the money for the purpose of employing it in bribery; and actually employed it to that purpose. The trust committed to the defender was therefore of an illicit nature, and all action on it is denied by law. The circumstance, that the defender, by undertaking the trust, was equally criminal as the pursuer, does not preclude him from pleading this exception to the action. It is an established point in the case of smuggling contracts, and others of a like kind, where both parties are equally criminal, that the defender is not barred on this account from pleading the exception. Were it otherwise, the object of the law in denying action on illicit contracts would be entirely defeated.

Answered for the pursuers; That Colonel Campbell had not entered into any illicit compact with the defender: That the money was put into his hands for the purpose of giving entertainments to the people; but that he had received no instructions from the defender to employ it in bribery. The pursuer is charged with a crime, and he must be presumed innocent till his guilt be shown. The defender's averment fixes only his own turpitude; but he must establish by proof the unlawful concert he alleges, otherwise his defence, which rests on the hypothesis, that an unlawful agreement had taken place, falls to the ground.

Observed on the Bench; If the pursuer could produce any voucher of this money being in the hands of Scotland, the averment of a *turpe pactum* would

not be sufficient to screen the defender from accounting ; but, as the receipt of the money rests on the acknowledgment of the defender, the *causa dandi* is an intrinsic quality, and cannot be separated from the other parts of it. The judgment was,

“ Sustain the defences, and assoilzie.” See RECOMPENCE.

Lord Ordinary, *Braxfield*. Act. *Ilay Campbell*. Alt. *Rae, M^cLeod*. Clerk, *Tait*.
Fol. Dic. v. 4. p. 29. Fac. Col. N^o 46. p. 80.

No 72.

1786. February 1. Mrs DALRYMPLE against SHAW.

Mrs DALRYMPLE pursued Shaw in an action of declarator, for having it found, That as, at the solicitation of her friends, the office of keeper of the register of sasines for the county of Ayr had been obtained for him by the Member of Parliament for that shire, on a condition stipulated by her, of his paying to her, and her children after her, five sixth parts of the fees and emoluments of that office ; so he was now bound to fulfil that condition. When the cause came to be advised, this question was suggested, Whether such a paction was *contra bonos mores*, and so not actionable. Afterwards, in support of the objection, the defender

Pleaded, The stipulation in question is inconsistent with the nature of a public office. The salaries or emoluments pertaining to such, are not to be deemed merely adequate to the service performed, but constitutionally requisite to preserve to the public officer that degree of independence, and that rank in life, which are suited to the extent of the trust committed to him. In another view, it is virtually a bribe received, or a corrupt bargain entered into for the procurement of an office of public trust ; a thing reprobated by express statute in England, 12th Richard II. cap. 2., as it is by the spirit of our common law, the abuse not seeming to have ever risen so high in this country as to demand the special interposition of the Legislature. In a case similar to the present, action was denied on the principles now stated ; 9th February 1759, Young *contra* Thomson, No 70. p. 9525.

Answered, The statute quoted, and others posterior, such as 5th and 6th Edward VI. cap. 16. afford proof, that by the common law of England, the sale of public offices was not *malum in se* ; otherwise those enactments would have been superfluous. Nor is there any reason to suppose our own common law different in that respect. The case of Young and Thomson must have been decided on some other ground than that of *pactum illicitum* ; since of two transactions to which that objection was equally applicable, one only was annulled by the judgment of the Court. In fact, nothing is more openly sold than are public offices every day ; the clerkship of the High Court of Justiciary, for example, the depute-clerkships of the bills, the sheriff-clerkships.

No 73.

Is it *pactum illicitum* if a person stipulate a benefit to himself, or to another, for obtaining for a third an office from Government ?

No 73.

The Court were agreed, That it is *contra bonos mores*, and illegal, for those in power, procuring from Government, offices to other people, to stipulate a sum of money, or any of the emoluments, either to themselves, or to third parties. Some of the Judges thought the present case substantially of the same nature; while others strongly urged this distinction, That here the Member of Parliament bore no part in the transaction in question; and as there is nothing wrong in obtaining a public office from favour to a particular individual or family, so it must be right to do so in the manner best suited to the beneficent end proposed.

It became unnecessary, however, to decide the cause on that general ground; the evidence of the alleged stipulation having been found insufficient. But as the defender declared his willingness to grant a part of the pursuer's demand, to that extent,

THE LORDS decerned against him.

Reporter, *Lord Rockeille.* Act. *Dean of Faculty.* Alt. *Blair, Corbet.* Clerk, *Home*
S. *Fol. Dic. v. 4. p. 28.* *Fac. Col. No 252. p. 386.*

1786. February 16.

WILLIAM MORRIES, and Others, *against* JOHN WILSON, and Others. .

No 74.

The payment, by one political party, of an elector's debts, in order to counteract the designs of the opposite party, who had instigated the creditor to the execution of ultimate diligence, not construed to be bribery and corruption.

IN a complaint under the statutes of the 16th Geo. II. cap. 11. and 14th Geo. III. cap. 81. against an election of magistrates and council of the burgh of Dunfermline, it was

Objected, That the votes of certain persons had been obtained by means of bribery and corruption; for that, they being utterly bankrupt and under ultimate diligence, their debts had been paid by the political party in favour of which they had given their voice. To this objection, it was

Answered, That the creditors of those voters had been instigated by the opposite party to execute that diligence, in order to prevent them from exercising their right of election; and therefore that such payment of debts was justified by the restoring of electors to a state of freedom, of which, from sinister motives, they had been deprived.

The Court, adopting the argument of the respondent,
"Repelled the objection, and dismissed the complaint."

Act. *Abercrombie, Maconochie.* Alt. *Wight, Cullen* Clerk, *Menzies.*
S. *Fol. Dic. v. 4. p. 28.* *Fac. Col. No 259. p. 395.*

S E C T. XIII.

Smuggling.

1723. November 27.

The COMMISSIONERS of the Customs *against* Mr JOHN MORISON,
Student in St Andrews.

MORISON having had a parcel of brandy that had not paid the duty, proposes to sell it to Scot and Thomson, they running the risk of seizure in bringing it over the water from Fife; the buyers agree; and upon that account, get a considerable abatement of the price. The brandy happened to be seized by the custom-house boat; and when the seller charged the buyers upon their bills, they suspended upon this ground amongst others, That the bills were granted as the price of brandy, which they knew not at the time of the bargain to have been un-entered; and that it was seized by the custom-house boat. To which it was *answered* at discussing the suspension, That they well knew the brandy was not entered, and that *de facto* by the bargain, the buyers were to run the risk.

While this debate was in agitation, the Commissioners of the Customs perceiving it would give a considerable check to these unfair traders, if the credit that subsists in the transactions among them were broken, interposed by petition, craving that the LORDS, before they should descend to examine the particular arguments used by the defenders for avoiding payment of their bills, would take the general point into their consideration, and find that process is not competent upon such illegal transactions.

The topics insisted upon were two: 1st, That this was a bargain *super re illicita*; which in law can afford no manner of action to the party, who knowing it to be such, transacted upon it: That though where a thing is not simply prohibited, or *extra commercium*, there may be lawful bargains upon it, where parties act *bona fide*; yet where the parties contractors are in the full knowledge, that the thing they bargain upon, is in circumstances that render it not the lawful subject of commerce, it is *quoad* them in the same case as it were simply prohibited; it is a thing known to the buyer, to be in the hand of the seller by theft from the public, which is rather more atrocious than theft from a private person. But, 2^{do}, (and upon this point was laid the main stress,) That here there was not singly a bargain upon a commodity, knowing the same not to have paid duty; but a bargain made for defrauding the revenue, where one of the express stipulations is, "the undertaking to commit the fraud." And here the disposition of the law is clear, that a bargain being in itself unlawful, whatever either party becomes thereby possessed of, he retains unaccountable to the other, to whom the bargain can afford no action, though:

No 75.
Action found competent for the price of smuggled goods, tho' bought as such.

No 75.

it may subject both to a penalty ; and therefore, though the brandy had been actually received by the suspender, he could not, upon such an unlawful bargain, have action for the price. To illustrate this matter, let it be supposed the brandy had landed safe at Pinky, and that Scot and Thomson had agreed with a common car-man to bring his car by night to assist them in carrying off their purchase, for which he was to have ten times the ordinary wages ; can it be thought, in this case, that the car-man would have action for his wages ? It is believed not ; and the reason is yet stronger, why Morison should not have action against Scot for the price.

To which it was answered, Were brandy altogether prohibited as to the use as well as importation, it might come possibly under the description of *merx illicita* ; though, even in that case, it might be a question, ' Whether the price of it, when truly bought and delivered, would not be due ; ' but since neither the importation nor the use of brandy is prohibited, since it is most certainly the subject of commerce, it is hard to find a reason why it should be deemed *res illicita*. All prohibitory penal laws are strictly to be interpreted ; and, where the law has provided certain penalties, it is a rule, that none other or greater can be exacted. If the law had satisfied itself with prohibiting the importation of brandy without paying duty, and had gone no further, it is certain, that the brandy imported contrary to that prohibition, would not have been forfeited ; and as the law has gone further, and has provided diverse forfeitures and penalties for each transgression, this must be deemed the sole sanction with which the execution of the law is enforced ; and recourse cannot be had to further expedients, until they are by statute enacted. The payment of the duty of brandy, is secured by many different precautions ; if it is imported in prohibited casks, it is forfeited ; if seized in running to be laid on land, or even in carrying at land, it is forfeited ; if, by the party's oath, the importation can be proved, the duties may be recovered ; the persons who run it, and those who assist in running, are liable to penalties. But here the law stops, leaving brandy still in the hands of the possessor a merchantable commodity, and allowing the use of it to all the lieges. To proceed further then, and to declare that no person who buys it is liable to pay the price, would be surely to lay a further incumbrance on that trade ; but an incumbrance that has no foundation in the laws of the revenue, and that nothing less than the legislature could induce. Were games at hazard simply prohibited by statute, without any further provision, such as play would be guilty of a trespass ; but surely the bills, bonds, or other securities given for play-debts, would not be void ; which was the reason why the statutes made in that behalf added to the general prohibition a special provision, that securities given for sums lost at play should be ineffectual. It is suggested, ' That any contract or agreement, for running of goods is unlawful.' This is admitted ; and it will be plain, from enquiry into the reason of this, that the single act of buying goods after they are run, is not unlawful. If a person bargain with a runner of goods, to assist

him, for a certain sum of money, to set these goods clandestinely on land ; or if a car-man, after they are on land, should bargain privately to transport them, such persons, doubtless, are art and part of the fraud ; their paction is *de re turpi et illicita*, to aid a person to trespass the law, and to defraud the revenue ; if the runner's action is guilty, the action of the person assisting is no less so ; and the hire or price of the guilty action may properly fall under the *condictio ob turpem causam*. But when the goods are safe on shore in the proprietor's cellar, when they have past perhaps through several hands in sale, the person who buys them commits no trespass against the law, neither does he who sells them ; because, by no statute, is the buying and selling prohibited ; and, where there is no prohibitory statute that can be transgressed in the act of buying and selling, no illegality is committed, and consequently there is no turpitude. Every man in the nation who purchases Burgundy or Champagne, knowing it to be imported from Holland, buys a commodity prohibited to be entered, which has paid no duty, and consequently forfeitable, since, by the statute of navigation, these wines are not enterable from Holland. Every person who in Scotland buys claret, knows that he buys French wine, which has not paid the duty of French wine ; and purchases it indeed as such, since he would not give the price for it, if it were Spanish, under the name whereof it is entered. What then must be said ? are these purchases void ? are the buyers excoemed from paying the price ? must the bargains, which, between them and the sellers, are absolutely fair and just, be null and of no effect, to the seller's prejudice, without any law or statute on that behalf ? one should, with submission, think this cannot be admitted without a great absurdity. Again, it is by express statute forbidden to kill salmon after a limited day, and a penalty is inflicted on transgressors ; nevertheless, thousands of people trespass against this law, kill black fish, smoak them, and sell them. Should a purchaser, who buys such smoaked fish, knowing them to have been killed in forbidden time, pretend to avoid payment of the price on no other ground, than that the salmon caught in breach of the law was *res illicita*, it would be a good answer, that though the killing was unlawful, no law prohibited the sale, which being fair and just betwixt the buyer and seller, must, with regard to them, have the legal effect. It is hinted, ' That run brandy is a kind of *res furtiva* ;' a consequence whereof would be, that the bargain made concerning it, it being known to be such, is unlawful, and can yield no action. But it is a point of certainty equal to a principle, that the property of run goods, prior to the seizure and condemnation, is in the private party. The Crown indeed has a right to the duty, and the goods are forfeitable if seized ; but, prior to the seizure, there is no *jus in re* to the Crown ; the owner may export, use, or dispose of them at pleasure ; and therefore there is no foundation to suggest, that he cannot convey the property by delivery on a sale, which certainly a thief could not. It is further suggested, ' That, in the case in question, there was a separate consideration, which amounted to an explicit bargain for defrauding the revenues,

No 75.

'viz. the purchaser undertook the risk and hazard of transporting the goods ' free from seizure.' Had the purchasers (that is Thomson and Scot) undertaken this risk for the sake of the seller, to aid him in carrying on the fraud, it is already admitted, that the hire stipulated to them might be avoided ; but that is not the case ; Thomson and Scot made no bargain of this kind ; the seller was not at all concerned what they did with the goods ; and if they proposed to evade the custom-house officers, the risk was their own, and they were to account to themselves for it. On the contrary, the bargain with the seller consisted singly in this, that he was to receive the price, and deliver to them the brandy ; and that, after it was in their possession, he was to be no further concerned ; for the meaning of undertaking the risk *rei venditæ*, is no more than negative as to the seller, that he is no further obliged than to deliver the goods ; the consequence whereof is, that the buyer naturally undergoes the hazard of goods which by delivery are his own.

THE LORDS found, that action on the bills in question, for the price of run goods, though bought as such, is competent.

Fol. Dic. v. 2. p. 24. Rem. Dec. v. 1. No 40. p. 80.

1736. November 16.

SCOU GAL, &c. against JAMES GILCHRIST.

No 76.

No action lies for damages, on account of the not-delivery of goods sold, if the buyer knew, at the time of the sale, that they were prohibited or run.

THIS was a charge upon a decret of the Bailies of Edinburgh, for the damages sustained through the suspender's not-delivery of certain goods, such as brandy, &c. sold by him to the chargers.

For the suspender, it was *alleged* ; That the goods in question were sold as run goods, which appeared from the prices, and whole circumstances of the case ; therefore he could not be liable in delivery thereof, or for any damages arising through not-delivery ; seeing, by the 11th of Geo. I. chap. 29. ' It is ' provided, That, if any person shall expose to sale prohibited or run goods, ' the same shall be forfeited, and may be seized by the party to whom the ' same shall be exposed to sale, or any officer of the customs, &c. ; and that ' the person so offering to sale such goods, shall also forfeit and lose triple the ' value thereof.' Whence it was *contended*, That the suspender could not be liable to deliver those goods, which the buyer, without payment of the price, could not only have seized, but likewise have subjected the seller to triple the value ; that thereby the sale was annulled by public law, and the exposing thereof to sale was a statutory crime, subject to severe penalties, to which, by no law or equity, the suspender could be compelled.

2dly, It is also provided, by the same statute, ' That all prohibited or run ' goods, so bought by any person, shall, in like manner, be forfeited, and may, ' after delivery to the buyer, be seized and taken from him by the seller, or ' any officer aforesaid ; and the buyer, beside forfeiture of the goods, shall forfeit and lose triple the value, &c.' Whence it was *argued*, It did likewise

appear that the contract of sale was annulled ; seeing the seller was so far from being bound to grant warrandice to the buyer, that he might seize the goods himself, and have action against the buyer for triple the value ; which is quite inconsistent with the substance of the contract of sale.

Replied for the chargers : That the statute does not make void the contract touching run goods, which, however, could not have escaped the legislature, had it been intended. And, as to the above provisions, *1mo*, The forfeiture of the goods, and triple the value, is not in favour of the person who seizes, but of the Crown ; the act here entrusts the seller with a power to be exercised for the benefit of the public, which he may use or not at his pleasure, and which does not at all impinge upon the precise obligation betwixt private parties. For, *2dly*, Let us suppose the goods actually delivered, and, upon that, seized by the officers of the public ; surely it will not be pretended, that this would save the purchaser from payment of the price : or, let us even suppose the goods were so seized by the seller himself ; neither could this stand in his way to demand payment of the price, which became due upon delivery ; and his afterwards seizing of the goods, as an officer of the Customs or Excise might have done, could infer no *culpa* or blame to forfeit his price : if so, the consequence is undeniable, that the seller should be liable in damages, if he does not implement his bargain. *3dly*, Admitting the forfeiture were to accress to the benefit of the person who seizes, even this would make no alteration ; for, though the seller might seize the goods after delivery, yet the buyer has the very same thing to plead ; he might seize before delivery, and so the benefit of the forfeiture accress to him : so far they are *in pari casu* ; and, if neither the one nor the other has done this, what remains, but that the bargain should stand ?

Duplied : That though the statute does not expressly annul such contracts, yet it virtually does it, as above, and superadds severe penalties. And, to the *first*, It was *answered*, That, by an express clause in the act, the forfeiture and penalties are divided between his Majesty and the seizer. To the second, *second*, The present question is not concerning the recovery of the price of run goods ; for though, perhaps, if the buyer had received and disposed of the same, he would be liable for the price, yet that does not affect the present case ; for, in many instances where the contract of the sale is void, yet the buyer will be liable for the price in point of equity. Thus, if a minor, without authority of his curators, or even a pupil, purchases goods and disposes thereof to advantage, he will be liable for the price, though the contract was originally void ; but the action, in such case, does not arise from the contract, but from the natural ground of equity, that no person is allowed to profit by another's loss. And it is absurd to pretend, That, where the seller himself seizes the goods delivered, he could have action for the price ; if the price was actually received, he might possibly retain it *in penam* of the buyer, though the statute is silent on this head ; but, for certain, it is contrary to the nature of a contract of sale and warrandice therein implied, that the seller could sue for the price, when he him-

No 76.

self seizes the goods. And the present question is, if he can be obliged to the delivery thereof, or be liable in damages, if he fails therein, since he might have seized the effects immediately upon delivery.

To the *third*: The seller and buyer are indeed upon equal footing, as to the liberty of seizing the goods, and being entitled to triple value, &c.; all which plainly shows, that the contract is not binding upon the one party more than the other; so that, upon the whole, it is evident, that this act, in order to discourage the running of goods, has not only annulled contracts of sale concerning the same, but likewise imposed severe penalties upon the execution thereof.

The LORDS found the reason of suspension relevant, that the purchaser knew, at the time of the sale, that the goods were prohibited or run-goods, in terms of the act of Parliament.

C. Home, No 34. p. 64.

1740. November 6.

THOMAS WILKIE Merchant in Cowper of Angus, *against* THOMAS M'NEIL Merchant there.

No 77.

Action sustained on a bill granted for prohibited goods; the goods having been delivered to the buyer and seized by an officer of the revenue while he was carrying them home.

THE said Thomas Wilkie purchased from one Patrick Wallace, merchant in Aberbrothwick, 33 ankers of brandy, which were to be delivered to him next day at Hayston; and next morning, Thomas M'Neil (who was present at the bargain) came to Wilkie, who was then going to receive the brandy, and desired that he would allow him to be a partner for 13 ankers of the cargo. Wilkie agreed to the proposal; and, in order to execute the same, he drew a bill on him for the price of the quantity, (which he consented to give him), payable to Wallace. M'Neil accepted the bill, and gave it to Wilkie, to be delivered to Wallace upon receiving the brandy. After this, Wilkie went to Hayston and received the brandy, and gave Wallace Mr M'Neil's bill for the price of the 13 ankers, and his own for the remainder. But, in his way home, a Customhouse officer seized the whole.

Mr Wallace the seller, insisted against Wilkie for payment, not only of his own bill, but likewise for payment of M'Neil's bill, since Wilkie had signed the same as drawer.

Wilkie having been obliged to pay M'Neil's bill to Wallace, and having got an assignation thereto, proceeded to discuss the suspension of a charge which had been given by Wallace to M'Neil.

For the suspender it was *pleaded*, That though the bill bore value received, yet really and truly no value had been paid for it: That the true cause of granting it, was a promise to deliver a certain quantity of brandy, which had never been delivered; and that by the act 29. of 11th Geo. I. all bargains with respect to an unlawful subject of commerce or prohibited goods, such as brandy, though

No 77.

not expressly annulled, was virtually so. And as Wilkie has acknowledged, that the cause of the bill was run brandy to be delivered to the suspender, which he might have seized, notwithstanding his bargain, had it been offered to him, its being seized by a customhouse officer cannot vary the case. M'Neil was never concerned in the bargain with Mr Wallace, the original proprietor of the brandy, but was to receive a certain quantity of it; and, seeing it was not delivered, the risk ought, before delivery, to fall on Wilkie the seller. See *Scocgal against Young and Gilchrist*, No 76. p. 9536. l. 34. § 1. *D. De contra Empt.*

Answered: That delivery to Wilkie for his own and the suspender's account, at his desire, was delivery to himself; that as he was admitted to a share of the bargain with Wilkie, he must run the same risk. If, indeed the charger had sold him the brandy upon an advanced price, more than had been agreed for with Wallace, it might justly have been said, that, before the brandy was delivered to the suspender, the goods behoved to perish to Wilkie: But that was not the case; the suspender was witness to the whole of the bargain with Wallace, desired next day to have a share in it, and entrusted Wilkie with the receiving the goods for both their accounts. It is impossible therefore, to imagine that Wilkie could undertake the risk and expence of transporting the suspender's share of it, when he was not to get a farthing by it; and that after the brandy was delivered, the property of the suspender's part was as much his, as that of the rest was Wilkie's; so that when the whole perished, or was lost, each parcel must be lost to its proper owner. See No 75. p. 9533.

The statute does not concern this case; for the penalties thereby imposed upon the buyers or sellers, in favours of the one against the other, if he ceased to take the advantage, cannot apply, where one for his own and another's behoof, gets a bargain of brandy, or any such run-goods, delivered to him. For, to be sure, one of the partners cannot seize in prejudice of the other, or subject the other more than himself to any hardship, as the hazard must be common where the subject itself is so.

The LORDS found there was sufficient evidence, that the charger and suspender were partners in the bargain as to the brandy purchased from Wallace, and found that the delivery by Wallace to Wilkie, was equal to the delivery to M'Neil; and therefore repelled the reasons of suspension.

Fol. Dic. v. 4. p. 31. C. Home, No 155. p. 263.

1741. November 11.

ROBERT COCKBURN against JOHN and JAMES GRANTS.

No 78.

No action lies for damages, on account of the not-delivery of run

THE said Robert Cockburn purchased some ankers of French brandy from the Grants, part of which he received, and paid the price thereof; but the

No 78.
goods, if the
buyer knew
them to be
such at the
time of the
bargain.

price having risen, the other part was not delivered, whereupon he brought an action against them for damages.

Pleaded in defence, That the pursuer knew that the brandy was run or prohibited goods; and, consequently, the bargain fell under the statute, *undecimo Georgii I.* that the commerce of such subjects was plainly prohibited by that act; for, besides the general prohibition to import such goods, without regular entry and payment of the duty, and the severe penalties therein specified, it is enacted, 'That if any person shall offer or expose to sale any such goods, wares, &c. the same shall be forfeited, and the person to whom they shall be offered to sale may seize the same for his own behoof; and, further, the person who so offers and exposes them to sale, is made liable in triple the value; and, by another clause, such goods may, after delivery to the buyer, be seized and taken from him by the very person who sold the same; and the buyer is also made liable in triple the value.' It is true, the statute does not, in terms, discharge the buying and selling of goods so unlawfully imported; yet there can be no doubt, that such prohibition is strongly implied from the whole scope and purport of the law, where they are not only prohibited to be imported without payment of the duty under high penalties, but when so imported contrary to the prohibition, are, in effect, discharged to be bought or sold. For it is plainly impossible the common rules of law, in emption and vendition, can take place in a consistency with what is statuted in the act. How can there be a proper sale, where the property of the thing sold neither is nor can be transferred, but the goods may be retaken by the seller himself immediately after delivery? If the defenders could not have obliged the pursuer to pay the price, though the goods had been delivered, it follows, that he cannot bring an action for delivery, or damages in case of not-delivery; and so it was determined, 16th November 1736, Scougal and Young, No 76. p. 9536.

Answered, There was nothing in the title or statutory part of the law which could support the defence; *2dly*, Where certain penalties are inflicted by law, quite different from that of annulling the contract of sale, upon those who buy and sell such commodities, in some cases, those very penalties cannot be incurred without a previous sale; as, particularly, in this statute, the seller may seize the goods from the buyer; but no other person, except an officer of the Customs or Excise, can do this; which shows, that nothing can give him this privilege but the contract of sale, completed by delivery. If so, it must follow, that the sale is not prohibited, but that there is a necessity for a sale, before the penalty can take place; *3dly*, There is a very great difference between an act discharging all buying and selling of such and such goods, and, in case of sale, declaring the bargain to be void and null, and an act which only prohibits the buying and selling under a penalty. Besides, it is plain from the whole clauses, that the Parliament carefully avoided the enacting of any thing so as to annul a bargain of sale, though, at the same time, they enacted such

penalties as would have had the same effect, had advantage been taken of them; *4thly*, There is no such thing known in the laws of England as an implied prohibition; further, the buyer has the power first to seize, and the seller never has power to seize, except the buyer neglect to take the benefit of the law; so they are not upon a level: But if, by implication, the buyer shall be denied action, then the buyer becomes the most unfavourable person of the two, contrary to what ought to be, seeing the seller is the person who imports such goods.

THE LORDS found the pursuer could not maintain an action for recovering damages in this case.

Fol. Dic. v. 4. p. 31. C. Home, No 180. p. 301.

*** Kilkerran reports this case.

1741. November 2.—FOUND, on report, that no action of damages, for not-delivery, lay to the buyer against the seller of run goods.

This was so found upon the construction of the statute of the 11^{mo} Georgii 1^{mi}, cap. 29. entitled, Act for preventing Frauds and Abuses in the Public Revenue. Not that the said statute was thought to put run goods *extra commercium*; for where they are sold and delivered, it was not doubted but that there lay action for the price: But the act was thought to have this effect, to deny action for performance of any bargain about such goods, known to be such, not yet completed by delivery; and that such was the very intention of the statute, for discouraging traffic in that sort of commodity. For, in as much as it is thereby statuted, that the seller may, after delivery, seize the goods from the buyer, it was thought to be implied, that the buyer could not be bound to receive, when next breath the seller himself might seize; and if so, that same buyer could not have action of damages for not-delivery; and so the statute had formerly been constructed; 16th November 1736, Scougal and Young against Gilchrist, No 76. p. 9536.

Others were of a different opinion. Their notion was, that, as the statute had said no such thing as was argued to be implied in it, and which was obvious and easy to have been said, had it been so intended; so the end of the law, which was the discouraging this sort of traffic, was rather better attained by sustaining the action, and understanding the buyer bound to receive, even though the seller could forthwith seize; for, even in case of such seizure, they thought action would lie for the price, and also for triple the value, which would be yet a greater discouragement than the denying action to the buyer.

Notwithstanding this, the Lords again found as above.

Kilkerran, (PACTUM ILLICITUM.) No 3. p. 363.

1751. November 12.

WILLIAM STEWART *against* LAMONT of that Ilk, and CAMPBELL of Ottar.

No 79.

A bond, with a penalty, to an officer of the Customs, and his successors, to be paid in case any of the obligee's tenants should smuggle, found void.

ARCHIBALD LAMONT of that Ilk, John Campbell of Ottar, and sundry other Gentlemen, granted bond, narrating, that William Stewart, Surveyor of the Customs at Greenock, had, at their request, and on their becoming so bound, discharged a prosecution before the Vice-Admiral of Argyle, against James Black and others, for invading, beating, and bruising him, and obstructing him in the execution of his office; and that they had made payment to him of his expenses debursed in the said prosecution, and of a further sum in lieu of assythment; therefore, binding them, that no tenant, or person residing on their estate, should, for the space of seven years, by himself, or others in his name, or for his behoof, directly or indirectly, be concerned in smuggling certain goods mentioned, under the penalty of L. 100 Sterling, to be paid to the said William Stewart, or his successors in office, or the Collector of the Customs at Greenock for the time being, by the person on whose estate the person so smuggling should reside for the time, for every such delinquency; which should be probable by the confession of the delinquent, or the oath of two or more witnesses, and be cognoscible by the Sheriff of Argyle, in a summary way, by petition at the instance of the said William Stewart, or the said Collector, or their successors in office, who should be holden to make previous intimation of such intended prosecution, to the landlord of the delinquent, 14 days before the proof should be adduced therein.

After the lapse of the seven years, William Stewart petitioned the Sheriff of Argyle, shewing, That within the time, certain persons residing on the grounds of Lamont and Ottar, had been concerned in smuggling, though the goods were not landed on either of their grounds; and the cause was advocated; and the LORD ORDINARY, 23d February 1751, "Remitted the cause *ad hunc effectum*, that a proof might be taken before answer before the Sheriff, with this instruction to him, That he should allow a conjunct probation to both parties, of all facts and circumstances which had been condescended on by either of them."

Pleaded in a reclaiming bill, It was illegal in an officer of the revenue to exact such a bond; the legislature has reserved to itself the power of imposing duties, and of limiting the penalties necessary for putting the laws in execution; and it is not in the power of any officer to vary the regulations of the law. It would be dangerous if officers had this power; as they might, by threatening prosecutions, intimidate people to submit perhaps to the regulations of Excise, with regard to duties to be uplifted as customs. The terms of this very bond are extremely unreasonable; as, although the obligants should guard their estates, they could not hinder persons residing on them to smuggle elsewhere; and by the bond the penalty is incurred, if they shall be concerned by

themselves, or others in their name, or for their behoof; and the infraction may be proved against the obligants by the confession of the meanest inhabitant. No 79.

By the act Henry VIII. *anno* 33. c. 39, all obligations concerning the King's Majesty shall be made *domino regi*, and to none other person, for his use *solvend. eidem domino regi*; and if any person take any obligation to the use of the King otherwise, such shall suffer such imprisonment as shall be adjudged by the King or his council; this bond being taken to these officers, otherwise than as directed by the statute, is null.

Answered, The officers have not illegally exacted this bond; but it was voluntarily granted by the obligants; they were concerned for their tenants, who had made themselves liable to punishment, and to exempt them therefrom, they came under this obligation, which the statute of Henry VIII. does not regard, as it concerns securities for debts previously due to the King; but here it was lawful to modify this original obligation as the parties pleased; it is not taken to the use of the King, but to the officers themselves; and whereas, at moving of the petition, it was observed that, considering it in this light, no more of the penalty would be found due than was equal to that interest of the officers, which they could shew was affected by the breach of the bond; it is *answered*, a person may stipulate a sum to himself on any condition, l. 38. § 17. D. De verb. oblig.

The statute does not annul securities taken, not according to its directions, but punishes the persons.

"THE LORDS found that the bond was illegal, and could produce no action."

Act. H. Home.

Alt. Ferguson.

Fol. Dic. v. 4. p. 33. D. Falconer, v. 2. No 229. p. 277.

1759. February 27. ANDREW WALKER against JOHN FALCONER.

JOHN FALCONER merchant in Nairn, commissioned from James Jamieson merchant in Gottenburg, a quantity of teas; which having been shipped by Jamieson on board a vessel for Portsoy, in terms of the commission, the vessel was, upon her arrival, seized by the customhouse-officers, together with all her cargo.

Jamieson, by his trustee Andrew Walker, brought an action against Falconer, for payment of the price of the teas.

Pleaded for the defender, By act 12mo, Charles II. cap. 17. teas are prohibited to be imported into Great Britain from Gottenburg, or any other place of which they are not the product, or from which they are not usually first shipped for transportation; the contract therefore between the pursuer and defender was unlawful, and can afford no action in a court of law. The intention of the parties was to carry on a smuggling trade; and Mr Jamieson could

No 80.

Action sustained at the instance of a foreign merchant, for the price of prohibited goods sent on commission.

No 80.

not be ignorant how the law stood in this respect, as he is a native of Scotland, and carried on business here as a merchant for some years before he went abroad. It would therefore be improper to sustain action upon this contract, which was entered into directly against law. Nor is it enough to say, That the statute has inflicted certain penalties upon transgression, such as forfeiture of the goods, &c. ; and that the Court has no power to add new penalties. The present objection, if sustained, is not adding any penalty upon the pursuer ; it is only denying the aid of the law, to render effectual a contract which is reprobated by the law.

Answered for the pursuer, The maxim, *Quod lege prohibente fit, est ipso jure nullum*, admits of this general exception, That where the prohibition is enforced with a penalty, and does not enact an express nullity of the transaction, the sole effect of contravention is to incur the penalty. The legislature of Great Britain has prohibited the importation of certain commodities under particular penalties ; but has not yet gone the length of denying action to the foreign merchant who furnishes such goods upon commission from his correspondents in this country. Nor would it be proper or expedient, that such a certification were imposed ; for, however faulty or criminal it may be in the subjects of this country to import uncustomable goods, this cannot, in justice, strike against the foreign merchant or factor, whose duty it is to answer his commission, and furnish his correspondent, without enquiring, whether the goods may be lawfully imported into this or the other country. A merchant residing abroad, whether a native of this country or not, cannot have access to know, or be informed, of the different revenue acts which are from time to time passed in Great Britain ; neither is it his business to enquire into these matters. His commission is at an end how soon the goods are shipped upon the risk and peril of the person who gave the commission. The importation is the act of the purchaser ; which, however criminal with regard to him, cannot vitiate the antecedent sale. No trade could be carried on among different nations, if the contrary doctrine were to be established.

" THE LORDS repelled the defence."

Act. Lockhart.

Alt. A. Pringle.

W. J.

Fol. Dic. v. 4. p. 31. Fac. Col. No 16. p. 27.

No 81.

1761. November 23. MAGNUS GRAY against JOHN BARRON.

MAGNUS GRAY freighted his ship for six months to John Barron. Both from the charter-party, and from the circumstances of the voyage, it appeared that she was freighted for a smuggling adventure. Her contraband cargo was seized in the Orkneys.

Gray pursued Barron in the Admiralty Court for payment of the freight. The Judge Admiral found, That the contract was unlawful, and that therefore Gray had no action for payment of the freight.

The cause having come before the Court of Session by suspension, and into the innerhouse upon informations, the Court ordered a hearing in presence upon this abstract question, whether an action lies for payment upon the performance of a smuggling contract? After the hearing, there were informations ordered; but one of the parties having dropt the suit, the point was not decided.

No 81.

A.R. Montgomery, J. Dalrymple.
J. M.

Alt. Garden, Lockhart. Clerk, Justice.
Fol. Dic. v. 4. p. 33. Fac. Col. No 64. p. 148.

1765. November 13. MORE and IRVINE against STEVEN.

No 82.

Action lies at the instance of a foreign merchant, for the price of prohibited goods seized on the passage.

STEVEN, merchant at Newtyle, having commissioned a quantity of tea, brandy, &c. from More and Irvine merchants at Gottenburg, to be shipped on board the first Swedish vessel bound to the coast of Scotland between Ythan and Peterhead, the vessel was driven, by stress of weather, into the Frith of Forth, where it was seized; and afterwards condemned in the court of Exchequer; and, in the trial, More and Irvine appeared and claimed the cargo as their property.

It was *pleaded* for Steven, in a suspension of a charge for payment of the price; *1^{mo}*, As this was a bargain entered into by subjects of this kingdom, for the importation of goods, which the contractors well knew were prohibited to be imported, it was *pactum illicitum*, on which no action ought to lie; and it would be expedient to refuse action, as that would be a means of discouraging smuggling;

2^{do}, The conditions of the commission had not been observed, as the ship, instead of touching at the part of the coast directed, had come into the Frith of Forth, where it was seized;

3^{tio}, The chargers, by claiming the cargo as their property, shewed they did not understand the commission to have been properly implemented.

Answered to the 1st defence; Though, by special statute, the goods in question are, in certain circumstances, put *extra commercium* in this country, yet they are, *jure gentium*, of free commerce at Gottenburg, from whence they were commissioned. The prohibitory enactments of these statutes can have no force at Gottenburg, or any place beyond the jurisdiction of the British legislature; persons residing in a country subject to different laws, are not presumed to know or attend to the various laws enacted in this country for regulating such matters; nor are they obliged to enquire, whether the purchasers are to enter the goods or not, but, as factors, must answer such commissions as are sent them. The dismissal of this action would not have the effect of discouraging smuggling; it would only change the course of the trade, and throw the whole of it into the hands of foreigners, who would only deal for ready money. See Lord Bankton, v. 1. p.

No 82. 413. § 16., and 27th November 1723, Commissioners of the Customs *contra* Morison, No 75. p. 9533; Walker *contra* Falconer, No 80. p. 9543.

To the 2d; The goods were shipped on board a Sweddish ship, bound to that part of the coast of Scotland where they were directed to be sent, though the vessel was driven, by stress of weather, into the Frith of Forth. Foreign factors, or merchants, are always understood to have fully implemented their commission, so soon as they have shipped the goods commissioned, agreeably to the directions of their constituents;

And, as to the 3d defence; It was *observed*, that it was usual for the foreign merchant to claim the goods in the Court of Exchequer, in order, if possible, to save them from condemnation.

"THE LORDS repelled the reasons of suspension; found the letters orderly proceeded, and expenses due."

C. B.

Fol. Dic. v. 4. p. 31. Fac. Col. No 15. p. 225.

1776. February 8. DUNCAN *against* THOMSON.

No 83.

Two persons having been engaged in a smuggling adventure, the one granted bill to the other for the value of his share of the profits. The goods being afterwards seized, the LORDS refused action for payment of the bill. *See APPENDIX.*

Fol. Dic. v. 4. p. 32.

No 84.

1779. February 26. M'LURE and M'CREE *against* JOHN PATERSON.

Action denied for the price of brandy purchased on board a vessel within port, the brandy having been in casks of a size which could not have been entered.

A VESSEL loaded with foreign brandy in small casks having come in to Clancy Bay, on the coast of Galloway, Paterson, jointly with others, purchased on board of the ship part of the cargo.—The casks were brought on shore by the purchasers during night in boats hired by themselves, and were left on the coast among the rocks until a convenient opportunity should be got of carrying them away. In a few days after, the purchasers granted an obligatory missive to Thomas Ferguson, proprietor of the goods, for the price.

Part of these spirits were seized by the revenue officers; but the remainder came safe to the hands of the purchasers, who afterwards refused payment of the price.—Ferguson indorsed to trustees the obligatory missive, and they brought an action upon it against the purchasers before the Admiral which was carried into the Court of Session by advocacy. The purchasers *contended*, that, at any rate, they were only liable for the price of what spirits they had received; but, *separatim*.

Pleaded in defence against payment of any part of the price ; Foreign brandy is prohibited, by the revenue statutes, to be imported in small casks, under the penalty of forfeiture to the Crown. The goods, in the present case, falling within the enactment of these statutes, were imported into this country, and had incurred forfeiture before they were sold to the defenders.—Previous to the sale, the vessel with the prohibited goods on board, had come into Clanyard bay, which is within the limits of a port.—This is held in law to be an act of importation, as much as if the goods had been landed on shore ; and the revenue officers were entitled to have seized them on board of the ship as forfeited by law.

In every instance where goods are smuggled, the property of them vests in the Crown from the time of committing the offence, and not merely from the time of seizure or condemnation. This necessarily excludes all kind of commerce in the goods smuggled.—The holder of them cannot transfer the property of them to a purchaser.—Any sale made by him flows *a non domino*, and the Crown could seize the goods, though in the hands of a *bona fide* purchaser.

But, at whatever time the property of smuggled goods vests in the Crown, if both parties are in the full knowledge that the subject sold was smuggled, the sale is a contract *super re illicita* ; and no action can be given to purchaser or seller for implement of the contract.—All traffick of this kind is considered by the law as criminal. Severe penalties are enacted by statute against those who knowingly offer prohibited goods to sale, or knowingly purchase them, 11th G. III. c. 30. § 18.

It is of no consequence, therefore, that the importing of such goods is not a moral wrong in itself.—When, by the act of the legislature, the public revenue is fixed, and smuggling prohibited, it is thereby rendered criminal ; and the defrauding the King of his revenues is to be considered thereafter as a moral wrong, as much as the defrauding an individual of his property.

The Court have repeatedly found, that no action lies at the instance of a buyer against a seller for delivery of smuggled goods, nor for damages on account of the non-performance of any smuggling contract ; Scougal and Young against Gilchrist, No 76. p 9536 ; Cockburn against Grants, No 78. p. 9539 ; Duncan against Thomson, No 83. p. 9546.

In the present case, there was not merely a sale of goods knowing them to be smuggled, but a joint adventure, where both parties were equally concerned in defrauding the Crown of its revenue.

Answered for the pursuer ; Goods, on being smuggled, do not vest *ipso facto* in the Crown.—In no case of forfeiture whatever has the Crown any real right in the effects from the time of committing the offence, unless the statute enacting the forfeiture declares, that it shall draw back to that period.—If this is not expressly provided, the property remains with the holder, and does not vest in the Crown until condemnation, or at least till seizure.

No 84.

The revenue statutes contain no declaration, that the forfeiture is to draw back to the time of smuggling.—They plainly intimate the contrary.—The words of these statutes are, ‘ That the goods shall be forfeited.’ Although, therefore, goods are liable to forfeiture by being smuggled, they remain *in commercio*, and are the property of the holders until they are condemned, or at least seized by the Crown officers.—The contrary doctrine is not supported by any authority from the law of this country, or the law of England.—But, in the present case, there is no room for this question, At what time the goods were forfeited? As they never were condemned in the Court of Exchequer, they cannot be considered by this Court as forfeited now, or at any other time.

The knowledge of parties, that the goods sold were smuggled, is no defence against payment of the price.

Foreign brandy is the subject of commerce in this country as much as any other article of trade; and, although smuggled into the country, yet, as long as the goods remain the property of the private party, and are not put *extra commercium* by seizure and condemnation, the sale of them is lawful.

The offence in the case of smuggling is entirely *malum prohibitum*. By importing foreign brandy in small casks, no moral wrong is committed, and the criminality of the importer arises solely from transgressing a statutory prohibition. The only penalties or forfeitures, therefore, which can be inflicted by judges on the offence, are those which the statutes have enacted.—This is the rule of law in every case where a trespass is declared by statute.—If it is meant that any contract or transaction betwixt the parties should be voided, over and above other penalties, it is so declared in the statute. The legislature thought this expedient in the case of game debts; and, accordingly, the obligation of debt is declared expressly to be voided by the act 9th Anne, c. 13. But, on the other hand, although members of the Court are, by act 1594. c. 220. expressly prohibited from purchasing pleas, and penalties annexed to the offence; yet, as the statute does not go further, and declare the transaction itself to be annulled, it is a fixed point, that the sale of the plea is good.—Among the many revenue statutes enacting forfeitures and penalties, no statute is to be found declaring, that persons selling smuggled goods shall forfeit to the purchaser the price of the goods sold and delivered to him.—From this, it may be concluded, that the legislature has purposely avoided that mode of correcting the evil as dangerous to the freedom of commerce.

The decisions founded on do not apply. In these cases, action was brought for implement of contracts to furnish smuggled goods. The pursuer was, therefore, demanding performance of an unlawful act, which could not be enforced by the Court.—But the payment of the price for goods delivered, is an act of common justice, and, therefore, it cannot be unlawful to demand it.—In one of these cases, Cockburn against Grants, for delivery of run goods, Lord Kilkerran observes, that, ‘ where they are sold and delivered, it was not doubted that there lay action for the price.’ Accordingly, in every case where

such action has been brought, it has been sustained; Commissioners of the Customs against Morison, No 75. p. 9533, where action was sustained for the price, although the goods were seized before delivery; Wilkie against M'Neil, No 77. p. 9538; Drummond against Yule, (See APPENDIX.) Bank. b. i. t. 19. § 17. Walker against Falconer, No 80. p. 9543.

The Court were of opinion, That, in this case, it was not necessary to determine the point, at what time smuggled goods are put *extra commercium*, and vested in the Crown, as, from the other circumstances, there was sufficient ground for holding the transaction to be unlawful.

The judgment was, " Find no action lies on the note in question, and assoilzie the defenders."

A reclaiming petition for the pursuers was refused without answers.

Lord Ordinary, *Auchinleck*. Act. *Rae, G. Wallace*. Alt. *Cullen*. Clerk, *Tait*.

Fol. Dic. v. 4. p. 31. Fac. Col. No 74. p. 138.

1788. December 5. JAMES M'LEAN against JOHN SWORD.

SWORD purchased, within land, from M'Lean, some brandy and coffee-berries, of which the latter was not the importer. The goods not being accompanied with a permit, were soon afterwards seized by the officers of the revenue; and, in fact, it appeared that the duties had not been paid for them, M'Lean brought an action for payment of the price against Sword, who

Pleaded; That this being a smuggling, and therefore an illegal contract, could afford no ground of action in a court of law; agreeably to the decision in the case of M'Lure and M'Gree *contra* Paterson, 26th Feb. 1779, No 84. p. 9546.

Answered for the pursuer; In the case referred to, action was indeed refused for the price of brandies imported in unenterable casks, and purchased at sea, within the limits of a port. But it would be dangerous to extend this principle to such cases as the present, where goods have passed, on shore, from hand to hand: For thus it would be in the power of every retail customer to plead that objection, to the great embarrassment and prejudice of trade.

The Court admitted the distinction, and adhered to the judgment of the Lord Ordinary, 'Repelling the defences, and finding the defender liable,' &c.

Lord Ordinary, *Alva*. Act. *Armstrong*. Alt. *Wm. Stewart*. Clerk, *Tait*.

E. Fol. Dic. v. 4. p. 32. Fac. Col. No 2.. p. 2.

No 86.

The court sustained action at the instance of a Scotsman carrying on trade abroad, for the price of contraband goods furnished by him to a person in Scotland.

1789. January 13. TRUSTEES of HENRY GREIG *against* JOHN DAVIDSON.

GREIG, a Scotsman, who was settled as a merchant at Gottenburg in Sweden, shipped, in consequence of the commission of Davidson, a quantity of tea and other prohibited goods, on board of a vessel bound for the coast of Buchan in Aberdeenshire. Greig himself paid the freight; which was so far above the ordinary rate, that the excess appeared to be a compensation for the risk attending a smuggling voyage; and in the bill of lading which he took from the shipmaster, the hazard of seizure, as well as that of the sea, was excepted.

An action having been brought against Davidson for payment of the goods, he *pleaded* in defence, That as the pursuer was a native of this country, though residing abroad, he was in a different situation from that of a foreign merchant; insomuch that the degree of participation in the smuggling adventure, which was apparent from the circumstances mentioned above, precluded his right of action.

The Lord Ordinary, in a process of advocacy, affirmed a sentence of the Judge Admiral repelling the defence; and the Court, on advising a reclaiming petition and answers,

Adhered to the interlocutor of the Lord Ordinary.

A second reclaiming petition however having been presented, the Court expressed doubts of the preceding judgment and appointed the petition to be answered; but in the mean time the dispute was compromised by the parties. A similar question was afterwards determined in the case of the Attorney of James Cantley *contra* Thomas Robertson, 11th February 1790, *infra*.

Lord Ordinary, Dunsinnan. Act. *Abercromby*. Alt. *Hay, Macnochie*. Clerk, Home.
S. Fol. Dic. v. 4. p. 32. Fac. Col. No 53. p. 94.

1790. February 11.

ATTORNEY of JAMES CANTLEY *against* THOMAS ROBERTSON.

No 87.

The Court refused to sustain process at the instance of a Scotsman carrying on trade abroad, for the price of contraband goods, furnished by him to a person in Scotland.

ROBERTSON sent, by a ship bound to Rotterdam, and from thence back to Scotland, a commission to a trader in that place for a quantity of gin. The person to whom the commission was directed not being found, the shipmaster applied to Cantley, then settled at Rotterdam, but who was a native of Britain, had formerly carried on a smuggling traffic in the north of Scotland, and still held correspondence with people of this country engaged in illicit trade.

Cantley on this wrote to Robertson, desiring authority to execute his order, and requiring either a remittance for paying the shipmaster his freight in money, or an order for the payment of it in goods.

Robertson in answer gave the authority required, and ordered the freight to be paid in goods at the rate of six shillings per anker, being greatly beyond

the allowance in fair trade. He added, in a postscript to his letter, that " he expected his goods to be delivered at Collieston," which is a noted place of rendezvous for smugglers.

Cantley shipped the goods, and took from the shipmaster a bill of lading, containing an exception of sea-hazard and searchers; and it bore the receipt of the above-mentioned rate of freight.

The cargo was seized on the coast of Scotland by the officers of the revenue; and Cantley having raised an action, in the name of an attorney, against Robertson,

The defender *pleaded*, The action being founded on a *pactum illicitum*, ought to be dismissed, the pursuer having been an accessory to the smuggling transaction. Mere knowledge, it may be admitted, that the buyer is acting for a British smuggler, and that smuggling is the object of the transaction, is not sufficient to constitute such accession; but, joined to this knowledge, there was, in the present case, an actual participation, by the pursuer's soliciting the commission, and by the whole other circumstances of the case.

The laws of this country will not permit a foreigner, more than a native, to violate them. Hence, the goods of a foreign merchant seized in the act of smuggling, are equally liable to confiscation as if they had been those of a subject; nor will action at his instance be sustained, if he be a party to the smuggle. But the accession of a native to an adventure in illicit trade, will be evinced by slighter circumstances than where a stranger is concerned, who owes no allegiance to our laws. Were a rebellion to exist in this country, a native residing abroad who should furnish arms which he knew were to be employed against the Government, would stand in a very different predicament from that of a foreigner entering into the same transaction.

It may be added, that nothing contributes so much to the increase of contraband trade, as the interference of natives of Britain when abroad, whose knowledge of the country, and of its inhabitants, gives them so peculiar an advantage, which therefore it is highly necessary to check.

In conformity to these observations was the decision in 1779, in the case of Sibbald and Company *contra* Wallace; * and in the Court of King's Bench, the English judges, in the case of Biggs and others *contra* Lawrence, 18th November 1789, refused action on this ground, that the plaintiffs, British subjects, carrying on merchandise abroad, acted illegally in furnishing goods which they knew were to be imported into Britain in defiance of its revenue laws.

Answered, A merchant having his residence abroad, whether a native of this country or a foreigner, is entitled to action here for the price of commodities sold by him, although he knew it was the intention of the buyer to import them in prejudice of the revenue, if he himself had no farther concern in the smuggle. This seems to be admitted; and were there any law to the contrary,

* Not reported; See APPENDIX.

No 87. it would lay such an embargo on the freedom of the commerce, as it could hardly survive. Nor is it any objection to so obvious a doctrine, that British subjects in foreign countries are prevented by their allegiance from furnishing, in the way of trade, warlike implements to be employed against our Government; which would be a true crime, a misprision of treason; whereas trespassing upon the revenue laws is not in itself immoral, being rendered criminal by positive law only, which is not of force beyond its territory.

Accordingly, that action ought to be sustained in such cases, has been repeatedly found, Walker *contra* Falconer, 21st February 1757, No 80. p. 9543; and Moir and Irvine *contra* Steven, 13th November 1765, No 82. p. 9545. Nor is the case of Sibbald and Company of a contrary tendency; for there the smuggling bargain was entered into, not with a merchant residing abroad, but with a native at home, who engaged himself to import contraband goods in defiance of the very laws to which he was subject at the time.

In like manner, in England, action was sustained for the price of contraband goods, because, in the words of Lord Mansfield, "though the seller knew what the buyer was going to do with the goods, he had no concern in the transaction itself;" Holman *versus* Johnson, Cowper's Reports, p. 341. As to the case of Biggs *contra* Lawrence, the transaction took place between parties in Great Britain, in the same manner as in that of Sibbald above-mentioned.

Before the defence be sustained then, some accession to the running of the goods must be shown on the part of the pursuer. This could only be, by his having an active hand in the importation, by his being concerned in the profit or loss of the adventure, or by the payment of the price being made to depend upon the safe arrival of the goods. Nothing of that kind however appears from the *species facti*; nor indeed any thing farther on the part of the pursuer, than the knowledge of a design to run the goods, and a natural desire of a profitable transaction in the way of his business. It seems impossible to conceive that he could have been liable to penalties for illegal importation had he returned to Scotland, as the shipmaster or the defender would have been; which is the criterion by which to ascertain the point of accession.

Replied, It appears from the report in the case of Holman, that the sellers were a foreign company bearing no allegiance to Great Britain.

The LORD ORDINARY sustained action; and the Court at first adhered to that interlocutor.

But a reclaiming petition, with answers, having come to be advised,

By some of the Judges, the idea seemed to be entertained, that in cases of this nature, even without participation, from knowledge alone of the buyer's purpose, the sale becomes an illegal act, so as to bar action. A British merchant carrying on trade abroad, it was observed, is by no means to be considered in the same light as a foreigner. He still continues bound by his allegiance to this country. If, in furnishing arms to rebellious subjects, he would

be guilty of treason, his affording to smugglers the means of infringing the revenue-laws is also a public offence, even smuggling being a species of rebellion.

No 87.

THE LORDS, by a very narrow majority, "altered their former interlocutor, and assoilzied the defender."

A reclaiming petition having been presented against this judgment, it was, by the same narrow majority, refused without answers.

Lord Ordinary, *Stonefield*. Act. *Dean of Faculty*. Alt. *Maconochie*. Clerk, *Home*.
S. *Fpl. Dic. v. 4. p. 32. Fac. Col. No 112. p. 210.*

1790. *July 7.*

The ATTORNEY of YOUNG & Co. against ALEXANDER IMLACH.

IMLACH commissioned a quantity of tobacco and rum from Henry Greig, a merchant in Gottenburg, but a native of Scotland. The bill of lading bore the exception of seizure; and it was evident, that Greig knew of the goods being destined for a smuggling adventure. From his letters it appeared, that he had been looking out for a cargo of such contraband goods for Imlach's use, and that, on a former occasion, he had employed his own agents at London to make an insurance of a cargo of that sort sold by him to Imlach, against the hazard of seizure by the revenue officers, as was evinced by the amount of the premium.

No 88.
Found in conformity with the above.

The goods were seized on their arrival in the Frith of Forth, and carried into condemnation. Greig afterwards drew bills on Imlach for the value, in favour of Young and Company, his agents in London.

In consequence of a commission likewise from Imlach, John Christian, a native of the Isle of Man, who carried on trade at Dunkirk, of which town he was a burgess, shipped for him a quantity of Geneva. The bill of lading in this case, mentioned the ship's being bound for Bergen, and expressed nothing as to the hazard of seizure. It appeared, however, that Christian's agents at London had, at his request, insured part of this smuggling cargo for Imlach. The vessel carrying the goods happened to be totally wrecked in the Murray Frith.

Imlach having granted a promissory note for the value, it was indorsed to Young and Company, who were also agents for Christian. They accordingly, in the name of an attorney, brought an action against him, for payment of both parcels of goods, before the Admiralty-court, where they obtained decree. A bill of suspension was presented, which the Lord Ordinary reported to the Court, who appointed memorials on the cause.

No 88.

The argument contained in them was not, in any thing material, different from that which occurred in the case of Cantley, 11th February 1790, No 87: p. 9550.

On advising the memorials, the LORDS, by a small majority, passed the bill."

Reporter, Lord Justice-Clerk.

Act. Abercromby.

Alt. Cullen.

S.

Fol. Dic. v. 4. p. 32. Fac. Col. No 144. p. 286.

No 89.

1791. January. NISBET'S CREDITORS against ROBERTSON.

An heritable bond was granted for the price of smuggled goods by a merchant in Scotland to his correspondent in Holland, who was accessory to the importation; the bond was assigned for value to a third person, who took infestment on it. On the bankruptcy of the debtor in the bond, the trustee for his creditors brought reduction of the security on the score of its being *pactum illicitum*, and the LORDS reduced it accordingly. See APPENDIX.

Fol. Dic. v. 4. p. 33.

1793. May 15.

ATTORNEY of THOMAS CULLEN & Co. against DAVID PHILP.

No 90.

A merchant settled abroad, whether a foreigner or a native, who is accessory to smuggling goods into this country, has no action for the price of them.

THOMAS CULLEN and Company, merchants at Ostend, had been in the practice of supplying David Philp at Boarhills in Fifeshire with contraband goods, sometimes on commission, and sometimes at shore price, that is, a price payable on delivery of the goods in Britain, and sufficiently high to ensure the vender against the risk of seizure.

Captain Oldfield always had the charge of the vessels employed by Cullen and Company on these occasions. By a letter from Cullen and Company to Philp in January 1789, they informed him, that Oldfield was to sail in a few days from Ostend, with a quantity of gin and brandy; that he meant first to call at Boarhills, when he expected Philp would be prepared for him, and assist him in the disposal of the cargo.

The letter was so expressed as to leave room for arguing, that the goods were the property of the captain.

Oldfield accordingly arrived at Boarhills soon after. Philp agreed to take a considerable quantity of the cargo, and accepted bills for the price, payable to Thomas Potts, nephew to Thomas Cullen, who acted as supercargo on this occasion. The greater part of the goods were seized in the landing.

The bills were indorsed to Sir William Forbes and Company, for behoof of Cullen and Company, to whose account they were immediately placed; and

Philp being charged for payment by their attorney, brought a suspension, in which No 90.

Both parties agreed, that on the principles established by the case of Cantley, 11th February 1790, No 87. p. 9550, and others, if Cullen and Company were accessory to the smuggling, no action could lie; and the one endeavoured to establish the accession by the evidence in process, and the other to show that there was none.

The Court were of opinion, that this adventure was just a continuation of the former illicit trade, and that the interposition of Oldfield was intended merely as a cover to the real transaction, and unanimously adopted the following distinction. When a merchant settled abroad, whether a foreigner or native of this country, simply sells goods to a smuggler, *tanquam quilibet*, and makes delivery on the spot, he can maintain action for them in our courts, though he suspected, or even knew, that they were meant to be smuggled into Britain; but if he is accessory to the smuggling, and thereby to an infringement of the laws of the land, (which he is bound to know as far as concerns his trade,) he cannot demand the aid of the British Courts for recovery of his debt. And this, (it was observed,) was not a new doctrine, but established before the case of Cantley, by that of Sibbald against Wallace, in 1779.*

THE LORDS suspended the letters *simpliciter*.

On a motion for expenses by the counsel for Philp, it was observed, that the principle of the judgment was *in turpi causa melior est conditio possidentis*, and therefore that no expenses ought to be awarded.

Lord Reporter, *Stonefield*.
Alt. *David Galbreath*.

Act. Dean of Faculty, *W. Murray*.
Clerk, *Home*.

D. D.

Fol. Dic. v. 4. p. 32. Fac. Col. No 49. p. 102.

1793. May 15.

REID and PARKINSON *against* JAMES MACDONALD, JOHN ELDER, and Others.

MESSRS KIRKPATRICK and Company, natives of Scotland, settled at Ostend, had been in the practice of carrying on an illicit trade with persons in this country, and, in particular, had formerly been engaged in a smuggling adventure with Macdonald and Elder of Inverness, and others. In spring 1790, Macdonald, &c: having embarked in a new scheme of the same nature, transmitted bills, for the price of the goods to be furnished, to Messrs Kirkpatrick and Company. These dealers at first undertook the commission, but afterwards declined executing it, on account of the disagreeable consequences (as they said) with which such adventures are attended, alluding to the late cases where action had been refused. They, however, recommended a person whom they called

No 91.
Found in conformity with the above.

* Not reported, see APPENDIX.

No 91. Bonaventura Gibert, a Spaniard, as fit to be trusted with their business. He having accordingly (as it was said) furnished the goods, the bills were transferred to him.

Elder, one of the Inverness merchants, was at Ostend when the ship was loaded. The vessel, which belonged to Macdonald and Elder, was cleared for North Faro, although the Isle of Sky was its real destination.

Kirkpatrick and Company, after declining the commission, continued to furnish the Captain with necessaries for himself, and to advance him money for the repairs of the ship.

The goods arrived, but in a damaged state.

The bills were indorsed by Gibert to Reid and Parkinson, for behoof of Kirkpatrick and Company, without value. The acceptors being charged for payment, raised two suspensions, and

Pleaded; It is evident, from the correspondence and circumstances of the case, that Gibert was the clerk of Kirkpatrick and Company, who were accessory to the smuggling, and acted as agents for the suspenders.

Answered; There is no evidence that Gibert was connected with Kirkpatrick and Company, and if he had, as the goods were furnished to the agent of the suspenders, who was on the spot, and were by him put on board a vessel which was not the property of the chargers, and as they had no concern in the after proceedings, it would be contrary to the principle of former cases, and the opinion of the Court in the case of Cullen and Company against Philp, (*supra*) to deny action for the price.

The Court were satisfied, from various circumstances of evidence, that Gibert was a clerk of Kirkpatrick and Company, and a person interposed by them to cover their own concern in the transaction. Gibert's letters, in particular, were held to be evidence of this, being in the same hand with Kirkpatrick's, and shewing a thorough acquaintance with the English language. The Judges, in general, were also of opinion, that Kirkpatrick and Company, by their advance of money for the vessel, the false clearances, and their delivery of the goods on board the vessel, had acted as agents for the business, and become participant of the smuggling. Some were at first moved by the circumstances of Elder being on the spot, at the loading of the vessel, and held, that the evidence of accession was defective. But, in the end, an unanimous judgment on the above grounds was given.

The Lord Ordinary had 'suspended the letters *simpliciter*.' The Lords 'adhered;' and on 30th May 1793, refused a reclaiming petition without answers.

Lord Ordinary, *Dreghorn*.
Clerk, *Sinclair*:

A& Geo. Fergusson.

Alt. Ja. Grant, Cha. Hay.

D. D.

Fol. Dic. v. 4. p. 32. Fac. Col. No 50. p. 103.

S E C T. XIV.

Turpis causa.—Sale to a *White Bonnet* at a Roup.—Obligation not to oppose reduction of a Verdict of Fatuity.—Transacting a Crime.—Transacting Church Penance.—British Subject purchasing a Captured British Ship.—Combination of Offerers at a Sale.—Combination to raise the rate of Wages.—Combination against receiving Money of a particular Coinage.—*Pactum contra utilitatem.*

1745. February 8. Lord LOVAT against FRASER of Strowie.

CAPTAIN Simon Fraser, who, in the year 1693, had been condemned for high treason, granted to Fraser of Strowie, condemned at the same time as one of his accomplices, a bond for 4000 merks, of date 7th March 1702, and payable at Martinmas 1708, with annual rent after the term of payment, on the narrative, that he was justly resting owing to him that sum; and containing this condition inserted after the testing clause, 'And these presents to stand in force on condition the said Hugh Fraser stands faithful to our interest, otherwise not.'

Strowie assigned the bond to his son the present Strowie, and the Captain now Lord Lovat, raised a reduction thereof, alledging it was *ob turpem causam*.

After some procedure in the action, a proof was granted to both sides before answer, concerning the cause of the bond, which being led, the import thereof came to be pleaded upon, when it was *alleged* for Lovat, That he had the misfortune in his youth, to entertain different notions of the interests of his country from his present sentiments; that, accordingly he was convicted of high treason, and fled to France, from which he returned to Scotland in 1702, and gave the bond in question to Strowie one of his accomplices; as he did several more of the like strain to others, to encourage them to be assistant to him in his designs; that it was proved Strowie was not in circumstances to advance the money, his estate having been evicted for a debt which was transacted by the late Hugh Lord Lovat, and he suffered to continue in the possession; the pursuer himself, had supplied him with provisions and necessaries, and had educated this defender; and old Strowie, who assigned the bond, had wrote my Lord a letter, testifying how much he was displeased with the use his son made of it, for he had only intended he should use it as an introduction to his Lordship.

No 92.

A bond was granted by a highland chief to one of his vassals, both of whom had been condemned for high treason, "on condition, that the latter should be true to the interest of the grantor."

The Court reduced the bond; but it being afterwards discovered, that prior to the date of the bond, the parties had been pardoned, the Lords found, that the bond in question was not granted *ob turpem causam*, and assolized from the reduction.

No 92. *Pleaded* for Strowie ; The pursuer's own lawyers had taken a great deal of liberty with his character, in accusing him of crimes which the defender contended he was innocent of ; that he had always the same attachment to the true interest of his country, and the lawful government thereof, having served King William as a Captain ; that, on the death of Lord Hugh, he went north to take care of the pretensions his family had to the honours and estate of Lovat, which he did in a warm, and not quite justifiable manner ; that he carried off by force the Lady Dowager Lovat ; that there being a project of a marriage between a son of my Lord Salton's and the young Lady the heiress of Line, he had threatened my Lord, and failing to intimidate him, seized him on his coming into the country, and kept him prisoner ; for which actions he was prosecuted for high treason, but the libel was restricted to treasonable rising in arms, and there was no proof of any intentions against the government ; that Strowie, who appeared to be in the possession of his estate, had suffered exceedingly on his account, which was a good cause for the bond, the onerosity whereof he was only put to astract. Captain Fraser had lived at his house with a band of men ; on his condemnation, the country was invaded by the Atholmen, who plundered Strowie's house, and did great damage, as did also the regular troops, by whom it was garrisoned ; his Lady was turned out, and 200 sheep, 20 black cattle, and 8 horses carried away ; and that the letter mentioned, was impetrate from him at my Lord's house ; and the minister who attended him on his death-bed had deponed, he solemnly declared he did not know whether he had signed any such letter or not.

That Lord Lovat brought no evidence for his allegations, and the presumption was for the justice of the cause of the deed ; it was not proved that he was then engaged in unlawful designs, he had formerly been in the service of the government, and that he was afterwards in its interest, his actions in the year 1715 shewed, when Strowie joined him ; and it was in history, that, at the time of granting this bond, he was actually treating with the Duke of Queensberry ; besides, the clause in the end was not the cause of granting the bond, but had been thrown in after it was writ out ; and it might be controverted if it were probative, being after the testing clause, and so the writer not designed ; but, allowing it its full force, clauses that will bear to be interpreted in a lawful sense, ought to be so interpreted ; and this might be understood of being faithful to his lawful interests, especially when this interpretation was so consistent with the subsequent actions of the parties, that in itself it inferred no more than was implied in ward-holdings, which did not oblige to rebellion ; and Lovat's own sense of fidelity to him, appeared by an earnest letter he wrote in the year 1718 to the clan Fraser, in which, looking upon himself as dying, he exhorted them to be faithful to the heir-male of the family, to stand by one another, and preserve a close connection with the Campbell's, and particularly to adhere to the last and present Dukes of Argyle, whose fidelity to the government was sufficiently known.

Pleaded for Lovat ; That it plainly appeared no onerous cause was given ; that the granter and receiver were both convicted of high treason, and the bond granted to secure the acceptor's fidelity was *ob turpem causam* ; that the expenses incurred by Strowie could be no cause, because they were never brought to account, there being understood a mutual tie in the Highlands between superior and vassal, which binds the one to support, and the other to protection ; and besides, they were incurred in an unlawful enterprize, in which they were both concerned ; that they could not be so very great, because it was proved, that the men who staid at Strowie's house, were maintained with the rents of the estate of Lovat, which the Captain had seized ; that genuine accounts had been published of plots he was engaged in at the time of granting the bond ; but supposing it originally good, Strowie had forfeited the benefit of it, by adhering to the interest of the heirs of line, whose factor he had been.

That it was proved the old man had owned the letter, expressing his resentment of his son's conduct, when he was well in his heath, and quite sober.

Pleaded for Strowie ; That the pursuer was so far from plotting against the government at that time, that, if Bishop Burnet might be believed, he was earnest and active in their service ; that the bond was not merely a gratification for services, but an indemnification for real losses which were proved, and must have been very great, notwithstanding what was brought from the estate of Lovat ; that it was on this account, might be inferred, from its being granted with a cautioner, to whom the Captain gave a bond of relief ; that the clause appeared not to have been preconcerted, but added, and if any unlawful interest had been intended, it would not have been exprest in the bond, and Strowie constantly adhered to him in all lawful ones, having joined him with another gentleman, at the head of 100 men before the taking of Inverness ; that the condition was not suspensive, but resolute, and must be understood to be purified at the term of payment, which was long before any pretended adherence to any other interest ; and, *lastly*, The letter taken from Strowie at Lovat's house, *remotis arbitris*, shewed his own apprehensions of the weakness of the cause.

Pleaded for Lovat ; The cautioner was his brother, the heir-male of the family, and who was not in circumstances to add any security to the obligation. It was thought by some of the Lords, that though Strowie's losses, which were proven, might have been cause to have indemnified him, yet bonds of this nature, given to persons to secure their adherence, were dangerous, and might be perverted to bad purposes, the tendency of them being to render in all things the receiver subject to the granter, and were therefore *contra bonos mores* ; that for this reason, bonds of man-rent were reprobated ; and that the great power of chieftains was of bad consequence.

THE LORDS, 30th November 1744, reduced the bond.

A petition was given in, which was ordered to be answered ; and in both these papers, the two parties strongly asserted their several allegations, that Lovat

No 92.

vat was, or was not, at the granting of the bond, an enemy to the government : But, at advising, Strowie's lawyers pleaded, they had made a discovery of a remission recorded in Chancery, both to Lovat and Strowie, by which the presumption flew off of their being then engaged in unlawful designs ; and it also appeared, he was afterwards fugitated for the same crime at the instance of the party injured, which process could not have gone on, unless his former condemnation had been taken away by the remission.

Answered ; This was a remission never accepted of, which shewed his obstinacy at that time, and made the case worse ; and, at the Chancery they registered the King's signatures, though not past the seals.

It was *argued* on the Bench, That there was a difference between the cause of an obligation and a resolute condition ; that turpitude in the cause would annul the bond, but in the other case it would vitiate the condition, and the bond become pure. With regard to the new production, Lovat was safe by the pardon to which the seals could be put, at any time during the granter's life ; that it had certainly past one seal before it came to the Chancery, and the ordinary way of recording, was on the passing the seals ; so it had probably past them all, and was in his possession.

THE LORDS, 25th January 1745, in respect of the remission prior to the bond, instructed by the record of Chancery produced in Court, found the bond in question was not *ob turpem causam*, and that the reasons of reduction were not proven ; and therefore assolizied.

Pleaded in a reclaiming bill, That the bond was null, as being a bond of manrent, and contrary to the statutes discharging leagues and bands, a practice early prohibited by our law, and the fatal tendency whereof, sufficiently appeared by the commotions in the last century in this country.

THE LORDS refused the bill, and adhered.

Act. Hamilton-Gordon & Graham jun.
Clerk, Hall.

Alt. R. Dundas, Lockhart, & H. Home.

Fol. Dic. v. 4. p. 25. D. Falconer, v. 1. p. 69.

1753. July 7.

ANDREW GREY *against* CHARLES STEWART, JAMES GREY, and JAMES MILLER.

No 93.
A sale made at a roup to a white bonnet is void, and the next highest offerer will be preferred.

JAMES GREY exposed his lands to be sold by public roup to the highest offerer. At the roup, James Millar was seemingly the highest offerer, and Andrew Grey was the second. Soon after the roup, James Grey, the seller of the lands disposed them to Charles Stewart, for whom it was pretended that Millar had offered by commission. Andrew Grey, the second offerer, insisted in a reduction of the sale made at the roup to Millar, and of the disposition made in consequence of that sale by James Grey to Charles Stewart ; and he contended that

No 93.

Millar was only what is called a *white bonnet*, viz. a person employed by the seller to raise the price without any intention of buying for himself, and secured that he should not be bound by his offer. The pursuer further alleged, that Charles Stewart was partaker of the fraud, in so far as he knew, that Millar was employed by the seller as a white bonnet.

At advising a proof in this case, it was mentioned from the Bench, that this too common practice of employing white bonnets at rousps, was a manifest cheat. The person who advertises a sale by auction, pledges his faith to the public, that he is to sell to the highest bidder, and is not to buy for himself. In this case, the pursuer was really the highest offerer, seeing the offer of a white bonnet is no offer at all. That in the case of the sale of Keith, Watson *against* Maule, No. 22. p. 4892. *voce* FRAUD; the Court was clearly of this opinion upon the general point, though the decision went upon the particular circumstances of the case.

“ THE LORDS found, that the offer made at the roup by James Millar, was made by him by commission from, and for the behoof of, James Grey the seller, and was illegal and fraudulent; and that therefore, Andrew Grey, the immediate preceding offerer, ought to be preferred as the highest offerer at the said roup; and found sufficient evidence, that Charles Stewart, who was present at the said roup, was partaker with James Grey of the said fraud; and therefore sustained the reason of reduction of the disposition by James Grey to the said Charles Stewart, and seisin following thereon, and reduced the same; and found the said James Grey obliged, on the pursuer's making payment to him of the price offered by him at the said roup, to dispoise the lands to the pursuer in terms of the articles and conditions of roup, and found the defenders liable to the pursuer in the expenses of this process.”

Act. Boswell.

Alt. Hay.

Clerk, Justice.

Fol. Dic. v. 4. p. 35. Fac. Col. No 87. p. 132.

1758. July 21.

JAMES GRANT of Delay *against* GEORGE SMITH.

JAMES GRANT of Delay, was creditor by bill for L. 476 Scots, payable at Whitsunday 1753, to one John Cuming, tenant in Tombea of Glenlivat.

Cuming, some time before sowing the crop of that year, had contracted various debts, and become insolvent.

The only subject of any value, for payment or satisfaction to his creditors, was the corn of that year's crop. Immediately after part of the corns were sown, and afterwards, in the months of June and July, while the corns were yet green, Cuming, being pressed by sundry of his creditors, who were about to poind his effects in virtue of their diligences, agreed with several of them, and

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No 94.

Sale of growing unripe corns, whether it transfers the property, so as to exclude the posterior diligence of other onerous creditors.

No 94.

made partial sales to them of so much of his growing corns in satisfaction of their debts; and soon after, the defender, George Smith, who was to succeed Cuming in his farm, and consequently needed the crop for stocking it, made a second bargain with these creditors, and bought from them the particular shares which each of them had got. These sales were publicly and openly made, and the corns delivered to the buyers by a sort of symbolical delivery, on the spot, and understood to be afterwards on the risk of the buyers.

The pursuer, thinking that sales of this nature could be no bar to lawful diligence, protested his bill, and raised horning thereon; and, on the 14th and 15th days of the month of September following, when the corns were quite ready for being cut down, he proceeded to poind them as they stood upon the ground. But in the execution of this poinding, he was stopped by the defender George Smith, who had purchased these corns from the creditors, and who had begun to cut them down.

The pursuer soon after brought a process before the Court against Smith for redress, and for having it found, that he had at least an interest *pari passu* with the rest of the creditors in these subjects, which had been carried off by partial sales from the common debtor in defraud of his debt, which was the most considerable one.

Pleaded for the pursuer, The principles of equity, the genius of our law, and the practice of the Court, unite to favour the claim of a just creditor, who has been cut out from sharing, in proportion with the rest, the only fund from which an insolvent person's debts can be paid. Our law has most justly restrained the voluntary and partial deeds of an insolvent debtor; and the Court has never failed to redress this sort of wrong and inequality, by bringing in all the creditors *pari passu*, where the preference arose from a total or considerable alienation made by the debtor, and the creditor aggrieved was not *in mora* to complain. It would be of very dangerous consequence, if such partial and premature sales were to be held good, and allowed to exclude other onerous creditors, seeing the bulk of the tenants in this country, when they become insolvent, have little or no other fund for payment of their debts but their crop upon the ground; and if they may lawfully and effectually dispose upon it before it is grown, or almost existing, upon pretence of paying particular debts, the greatest injustice would often be done. When corn is just sown, and perhaps until it is cut down and reaped, the right of property is complete in the debtor's person; yet there is no known or established course in law by which the just creditor can acquire or affect that right for security or payment of his debt: Shall then the partial deeds of the debtor transfer a right which the law cannot reach? If such sales to particular creditors are to be held good, *a fortiori* a sale of growing corns for ready money, to any friend or third party, knowing the debtor's insolvency, will transfer the property; and such purchaser will be secure: And thus the debtor wilfully to disappoint his creditors, may effectually convey the only subject of their payment, before it is possible for them to affect it.

In the present case, there neither was nor could be any real or symbolical delivery to complete the sales; therefore the property remained with the debtor, and was lawfully affected by the pursuer's poinding; and, at any rate, as those sales could not be completed, nor the property transferred to the purchaser, till after they came to take possession of the corns, by reaping them, which was after the pursuer's diligence by horning and poinding; therefore, the sales are plainly reducible upon the act 1621.

Answered for the defender; The sales in question were publicly made, and not clandestinely gone about, by interposing persons, to give an unjust preference to particular creditors; some of Cuming's creditors having their diligences ready to poind his effects, which would have made them preferable to this pursuer, the corns were fairly sold to them in payment of their debts; and the sales were completed in every shape they were capable of, from the nature of the thing. The corns were delivered over to the buyers, and remained upon their risk, and servants were appointed by them to take care of them. That growing corns may be bought and sold, and the property transferred, as was done in the present case, is agreeable to the opinion of all our lawyers, and the universal practice over the whole country; and if these sales should be reduced and rendered ineffectual, a very common and necessary branch of commerce would be stopped, to the great detriment of the public. The pursuer, in this case, has the less reason to complain of these sales, which were openly made to onerous creditors, because, after these partial purchases, there remained upon Cuming's possession other corns and effects, more than sufficient to have paid the pursuer's debt, and which he could easily have poinded for that purpose, without interfering with what had been allotted to the other creditors.

"THE LORDS sustained the defences; and assoilzied."

Act. Fra. Garden.

Alt Wal. Stuart.

G. C.

Fac. Col. No. 154. p. 274.

1758. December 14. MACLEOD against FRASER.

NORMAND MACLEOD of Macleod pursued William Fraser for relief of a bill of L. 70, granted by him, Macleod, to the Magistrates of Inverness, in the year 1745.

The facts on which he qualified his claim of relief were, That at the time of granting the bill, William Fraser was under trial in the Court of Justiciary, in the name of the King's Advocate, but at the expense of the town of Inverness, for the forcible abduction, rape, and marriage, of his now wife: That William Fraser had applied to him to make up the matter with the town of Inverness, and that he made it up with the town, by granting the bill in question, being the neat expense which at that time had been laid out on the

No 95.

It is no defence against an action of relief, that the sum engaged for by the pursuer was the price of the transaction of a criminal process brought against the defender.

No 95.

trial; and that in consequence thereof, the prosecution was dismissed against Fraser.

Answered for William Fraser, Supposing the facts to be true, they were not relevant to give a title to relief; for transacting a crime is in itself a crime, a null act; and the rule of law takes place, *Quod in turpi causa melior est conditio possidentis*.

"THE LORDS found William Fraser liable for the contents of the bill."

Act. Ross, And. Pringle, Ferguson.

Alt. J. Dalrymple, Lockhart.

J. D.

Fol. Dic. v. 4. p. 30. Fac. Col. No 146. p. 264.

1765. December 1765.

JOHN YOUNG *against* PROCURATORS of the Bailie-court of Leith.

No 96.

A regulation made by the bailies of Leith, confining the office of procurator before their court to those who had been apprentices to their procurators, or to their clerk, was found illegal.

IN the year 1722, certain regulations were made by the Bailies of Leith concerning the forms of procedure in the administration of justice, and the qualification of practitioners before that Court; among other articles, providing, "that when the procurators are not under three in number, none shall be allowed to enter except such as have served the clerk or procurator for the space of three years as an apprentice, and one year at least thereafter, beside undergoing a trial by the procurators of Court, named by the Magistrates for that effect." Upon this article, an objection was made against John Young, craving to be entered a procurator, as having served an apprenticeship to an agent of character before the Court of Session, and demanding to be put upon trial. The Bailies having found the petitioner not qualified in terms of the regulations, the cause was advocated; and the Court found the said article void as *contra utilitatem publicam* by establishing a monopoly.

Fol. Dic. v. 4. p. 37. Sel. Dec. No 235. p. 309.

1766. January 21.

BARR *against* CARR.

No 97.

An unlawful combination among the journeymen weavers in the town of Paisley found null, so as not to found an action.

THE journeymen weavers in the town of Paisley, emboldened by numbers, began with mobs and riotous proceedings, in order to obtain higher wages. But these ouvert acts having been suppressed by authority of the Court of Session, they went more cunningly to work, by contriving a kind of society termed the defence-box; and a written contract was subscribed by more than six hundred of them, containing many innocent and plausible articles, in order to cover their views, but chiefly calculated to bind them not to work under a certain rate, and to support, out of their periodical contributions, those who, by insisting on high wages, might not find employment. Seven of the

subscribers being charged upon the contract for payment of their stipulated contributions, brought a suspension; in which it was found, That this society was an unlawful combination, under the false colour of carrying on trade, and that the contract was void, as *contra utilitatem publicam*.

Fol. Dic. v. 4. p. 35. Sel. Dec. No 238. p. 312.

* * This case is reported in the Faculty Collection.

CERTAIN journeymen weavers of Paisley framed a contract of co-partnery, bearing to be for carrying on a joint trade of manufacturing and selling silk and linen goods, and containing the following articles: That the number of partners should not be less than 600; that the affairs of the company should be managed by a preses and 19 directors, annually chosen, and other officers; that each partner should be 2s. at the commencement of the company, and a small monthly sum during its continuance, which was declared to be for 12 years, from 8th May 1764; that no dividend of the profits should be made till the lapse of that period; that, upon calling a general meeting of the company, the rate of wages might be fixed, under which no member should be at liberty to work; that the shares should be transferable under certain regulations; that the directors should be at liberty to admit any number of additional partners upon certain conditions.

In the space of a few days, the contract was signed by more than 600 persons; and the co-partnery commenced under the denomination of the Universal Trading Company of Paisley,

At length some of the members refused to pay up their contributions, and being charged upon the contract, insisted in a reduction of it, as being no other than a combination of manufacturers to raise their wages; and, therefore, illegal both at common law and by statute.

Pleaded for the company, The institution was designed for the laudable purpose of carrying on a joint trade with the savings of their industry, which separately could not be turned to account by the individual members; and there is no law in Scotland which restricts the number of partners in a trading company.

It was not for the general interest of the company to increase the rate of wages; because, though part of the members were journeymen weavers, many of them were of different professions, some of them manufacturers, who had occasion to employ journeymen. And it was not in their power to do it, because the dealings of the company were not extensive enough to enable them to employ any considerable number of journeymen, nor their stock large enough to maintain them without working, should they be refused employment from the other manufacturers.

Answered, The number of partners, already above 600, and which may be increased to thousands; the employment of the partners, almost all of them

No 97. journeymen weavers, though a few perhaps may be masters of a loom or two, which they let out for hire; and the trifling amount of their contributions, are so many proofs, that the co-partnery could not be intended for carrying on a trade, or meant for any other purpose, than as a cover to an illegal combination for increasing the rate of wages. Indeed, by an express clause of the contract, the partners are taken bound not to work under the rates which shall be fixed by the directors.

An instance of the same kind occurred in 1762, in the case of the Woolcombers of Aberdeen, who had entered into a society, under pretence of raising a fund for the support of the aged or disabled persons of their trade; but, as there was reason to believe that there were different purposes at bottom, the Court found, "That such combinations of artificers, whereby they collect money for a common box, inflict penalties, impose oaths, and make other by-laws, are of dangerous tendency, subversive of peace and order, and against law; and, therefore, prohibited and discharged the woolcombers to continue to act under such combination or society for the future, or to enter into any such new society or combination."

Reference was also made to the statute 6th, Geo. I. cap. 18. § 18, as prohibiting the acting as bodies corporate, or raising transferable stocks without legal authority; though it may be doubted how far that statute, commonly known under the name of the Bubble act, is applicable to this question.

"THE LORDS found, that the contract and agreement in question was not intended for carrying on a manufacture, but is an illegal combination, and of dangerous tendency to society. And therefore found the reasons of reduction relevant and proven, and reduced and decerned accordingly; and found the defenders liable in the expense of extract."

Reporter, Gardenston.

Act. Wight.

Alt. H. Dundas.

Clerk, Ross.

G. F.

Fac. Col. No 30. p. 248.

1772. December 12. MITCHELL against BAIRD.

No 98.

A missive was granted to give no opposition to the reduction of the verdict of a jury. Suspended as *contra bonos mores*.

THE LORDS adhered to an interlocutor of the LORD ORDINARY, "sustaining this reason of suspension of a decree of an inferior court, that the missive libelled on was *contra bonos mores*."

The missive was of the following tenor: "March 27. 1766, Sir, As you have, of this date, given me your missive to give no opposition in the process of exhibition and reduction of the verdict of a jury at your instance against Janet Stevenson, my spouse, for which I promise to pay you L. 155 Sterling, in case I succeed in said process, as witness my hand."

The relative missive was of this tenor: "March 27. 1766, Sir, As you have, of this date, given me your missive for L. 155 Sterling, in order to yield all

claim of defence in the process of exhibition of the verdict of a jury, where-
in your wife, Janet Stevenson, is found fatuous, so I hereby promise to give
you no opposition in any respect in the reduction and exhibition of the said
verdict, or any other in my name, or for my behoof, by either word or writ,
from me, in any manner of way ;" and, upon the successful issue of the pro-
cess of reduction therein mentioned, the present action for payment of the sti-
pulated sum of L. 155 was brought, and, *prima instantia*, a decree passed for it ;
which the Court reversed.

Act. *W. Nairne.*Alt. *Rae.*Clerk, *Campbell.**Fol. Dic. v. 4. p. 26. Fac. Col. No 41. p. 111.*

1783. February 28.

AITCHISON against ———

THE LORDS found it was unlawful for a person intending to bid at a roup, to
give money to others that they might refrain from bidding. See APPENDIX.

Fol. Dic. v. 4. p. 35.

1783. March 1.

MURRAY against MACKWHAN.

A tenement situated in the town of Kirkcudbright was exposed to judicial
sale at Edinburgh. The only persons who intended to purchase this subject
were Mackwhan, together with William Johnston and John Hutton, all of
whom were commissioned by other people for that purpose.

These men, desirous to take advantage of their situation, by acting in con-
cert, formed the following scheme. One of them, for their common benefit,
was to purchase the subject at the upset price. Each man was then to mark
secretly on a slip of paper the highest offer which he had been commissioned
to make, and he whose offer was found on comparison to exceed the rest, was
to be preferred to the purchase ; whilst the excess of that highest offer beyond
the upset price was to be distributed among the associates to the amount to
which their several offers should have concurred. The tenement being sold
for L. 300, the upset price, the result accordingly was, that as Hutton's com-
mission exceeded that sum in L. 98, that of Johnston in L. 210, and that of
Mackwhan in 300 ; so to the extent of L. 98, all their offers thus far concur-
ring, there fell to be an equal division among them ; and two of them, Johnston
and Mackwhan, likewise uniting in the offer of L. 210, the excess of that sum
above the former offer came to be shared between them ; but here the distri-
bution ended ; the concurrence reached no farther. Mackwhan being of course
preferred to the purchase, granted bills to his associates for those respective
sums.

No 100.

Of those proceedings, as being grossly fraudulent, Mr. Murray, the pursuer of the action of sale, complained to the Court by a petition, in which he prayed that the sale might be declared void, and the subjects exposed to roup of new; and, in support of his application, he

Pleaded, The just price of subjects exposed to sale is that which is produced by the highest offer of purchasers, in competition. It is in reference to that probable contingent amount, that the upset price is calculated and adjusted, not as being itself the true value of such subjects. Any interference then of interested persons to prevent the effect of a public and fair sale in producing competition, is a wrong; the magnitude of which will be influenced by the degree of the *mala fides* or fraud from which it arises. In the present case, the fraudulent design of the combination is apparent, and the loss thence resulting great; the subjects having been sold for a price far below what they are worth. Were practices of this kind to be permitted, it is evident how pernicious they would prove in all cases like the present, in which subjects situated in remote parts of the country, are in this manner brought to sale in a place where so few persons are acquainted with their real value.

Answered, The articles of roup, which declare the upset price, as that for which, if no higher be offered, the subjects exposed are to be sold, form the contract between the seller and any purchaser. When therefore that price is offered, and thus one part of the contract is fulfilled, performance of the counterpart cannot but be just. Nor is there any illegal thing in such a combination as that in question, which is not to be distinguished from a co-partnery formed for the purpose of making a purchase. Nothing surely can be more lawful than this, and yet it is a natural effect of such a contract, to prevent competition, which consists in the mutual opposition of individuals. Combinations of purchasers too at excise and customhouse sales occur daily; and no attempt has ever been made to prevent them, because there is no law on which it could be founded.

Observed on the Bench, What the subject would have brought on a fair sale is its just value; a considerable part of which, instead of passing into the hands of the creditors, has been wrongfully pocketed by these associates; the effect of whose combination is the same, as if force or deception had been employed by some of them to debar the rest from coming to offer.

The judgment of the Court was as follows: "THE LORDS find, That the combination entered into between Mackwhan and the other persons above named was illegal; therefore find, That the said sale is void and null, and that the subjects must be exposed to sale of new: Find, That Mackwhan is liable in payment to Mr Murray, not only of the expense of this application, of which allow an account to be given in, but also of the expense of the new letters of publication, and whole other expense to be incurred in carrying the sale into execution."

Mr Murray afterwards preferred another petition, setting forth, there being reason to apprehend that the influence of the same persons would in another shape be still exerted to prevent the success of a new sale; and therefore praying, That Mackwhan might be found liable to pay a price to the full extent of his commission, *i. e.* L. 300 above the upset one. No 100.

The Court were of opinion, That it was just, besides annulling the sale, to grant reparation of any other damage which could be qualified as arising from the combination; and as Mackwhan, in terms of the articles of roup, on exceeding, by L. 5, the highest offer of Johnston, whose *maximum* was L. 210 above the upset price, must have been preferred to the purchase;

THE LORDS therefore found Mackwhan liable in payment of L. 515.

For the petitioner, *Rolland.*

Act. Hay Campbell.

Clerk, *Home.*

Fol. Dic. v. 4. p. 35. Fac. Col. No 104. p. 164.

1784. February 3.

PALMER against HUTTON.

No 101.

A British subject prisoner on board of a French privateer while she captured a British ship, having purchased the prize *bona fide* on his own account, was found to have not thus acquired the property; but that the original owner was entitled to reclaim it upon payment of the legal salvage.

A French privateer having captured a ship, of which Hutton was master, he, together with his crew, were kept prisoners aboard the privateer, and his vessel was sent into port. Meanwhile the privateer made prize of another ship, which had been abandoned by those on board of her, and which belonged to Palmer. It seems, that now the French Captain, unwilling to spare hands for the manning of the second prize, which was but of small value, at first determined to sink the vessel; but afterwards it was agreed between him and Hutton, that the latter should purchase her at the rate of 150 guineas. One of Hutton's crew was retained as a hostage in security of the price, while with the rest he himself returned home in the ship; bringing along with him, in the hand-writing of the French Captain, a sort of certificate of the bargain, specifying the particulars above-mentioned. Having in this whole transaction considered himself to have made a lawful purchase for his own behoof alone, Hutton, without acknowledging any interest in Palmer, employed the ship as his absolute property. Palmer, on the other hand, as soon as he got notice of the affair, reclaimed her, by an action in the High Court of Admiralty, which afterwards came by suspension before the Court of Session.

Pleaded for the pursuer, The defender is bound to deliver up, without any recompence or gratuity, a ship of which the pursuer is the only lawful owner. The defender could not acquire a right to the vessel by any contract with the captors. All states deem war unjust on the part of their antagonists; for every state asserts the justice of its own cause. Hence a capture by the enemy is always a wrongful act, from which no right can spring, and by which no property can be transferred; *Vid. Bynkershoek, lib. 1. cap. 3, de statu belli inter hostes.* Thus, in respect of our country and its laws, the capture in

No 101.

question was injustice and rapine, and the captors mere violators of the pursuer's property, who being themselves destitute of right, could impart none to the defender. This conclusion is not less justified by expedience; for otherwise the chance of re-capture, which naturally continues during the warfare, (Stat. 4th and 5th of William and Mary, cap. 25.) would be lost, and scope given to many treasonable frauds. It is true, that in the eye of the power which makes the capture, the same act which on the other side was viewed as unjust in the extreme, appears a result of the principle of retaliation, so perfectly equitable and right, that no *modus acquirendi dominii* can be more lawful; and that hence neutral states are permitted to be more impartial, to recognise the rights of war on either side, and acquire property taken in it. Still, however, to give a just title to the purchaser, a previous condemnation in the courts of law of the country of the captors is necessary; so that were the defender even the subject of a neutral power, he could not plead this as a valid sale. See Benton *contra* Brink, 23d July 1761, *voce* PRIZE; Burrow's Reports, Goss *contra* Withers, 23d November 1758.

As, therefore, the defender can claim no right of property in the pursuer's ship, so neither is he entitled to any recompence from him, much less to repayment of the price stipulated by the French Captain, which is almost equal to the value of the vessel. An illegal bargain, as that between the latter and the defender was, can never be the foundation of any claim in a court of law. It is an evil indeed which may be considered as falling under the sanction of the late statute, prohibiting the ransoming of British ships. Nay, though the transaction had been less unlawful, the defender, who even pretends not to have acted on the pursuer's behalf, but for his own interest alone, seems hardly entitled to the character or rights of a *negotiorum gestor*.

Answered, It has been admitted, that, by capture in war, property is so far transferred, that the subjects of neutral states may lawfully acquire it by purchase from the captor; and this concession ought not to have been limited, by supposing the necessity of any antecedent condemnation, of which the sole efficacy is to ascertain the *bona fides* of the purchaser, and strengthen his title against future challenge. The right of the captor results immediately from the seizure of his prize, independently of every other circumstance, such as *deductio intra præsidia*, Voet. *ad tit. Digest de captiv.* § 3. Now, why may not a British subject place himself in competition with strangers at the sale of British property taken in war; or purchase without such competition, and do so at sea, as well as on shore? If no good reason can be assigned for these restraints, then is the defender the true proprietor of the ship in question. The statute alluded to relates only to the ransoming of vessels by those in whose possession they are taken; and as to the argument concerning fraud, it is evident that there is not any room for that suspicion in this case.

If, nevertheless, the pursuer shall be supposed entitled to reclaim the property, the defender must have an equal right to a recompence for effecting its

restoration. This equitable claim is not to be forfeited by the inefficacy of the sale, which, on that supposition, influences only his right of property. No fraud in his conduct, nor any criminal act has intervened to bar his retribution; and it is of no consequence, that he acted on the idea of acquiring a right to himself alone; as the effect produced, not its motive, is the ground of that claim. Neither is he requiring in a court of law, the fulfilment of an illegal contract; he demands a just recompence only, for a pecuniary benefit *optima fide* conferred by him. That recompence, if it exceed not the value of such benefit, ought at least to be sufficient to save him from loss; for it is a great maxim of equity, that *nemo locupletior fieri debet alterius damno*. To this degree, the defender consents to moderate his demand; requiring nothing more of the pursuer, than relief from his engagement to the captor, by re-delivery of the hostage.

This cause was reported to the Court by the Lord Ordinary; when, considering the statute against ransoming as entirely out of the question,

"THE LORDS found, that the property of the ship in dispute was not transferred to the defender by the sale made to him, and that the pursuer is still entitled to reclaim or recover the said ship; but found, that the defender is entitled to a recompence for his bringing the ship within the pursuer's power to reclaim it; and remitted to the Lord Ordinary to call and hear parties' procurators on the extent of that recompence."

Both parties reclaimed against this interlocutor; the pursuer, so far as a recompence was to be allowed to the defender, and the latter, in as much as the property was adjudged to the former.

On advising mutual petitions and answers, the Court adhered, modifying the recompence to the amount of "the legal salvage premium ascertained by the statute to re-captors, together with the expense laid out on the vessel."

Lord Reporter, *Eskgrove*. Act. *Macleod*. - Alt. *Alex. Abercromby*. Clerk, *Robertson*.
Fol. Dic. v. 4. p. 31. Fac. Col. No 140. p. 219.

No 102.

A transaction between a kirk-session and a person guilty of fornication, whereby the latter became bound to pay a sum of money to the kirk-treasurer for behoof of the poor, legal.

1786. August 2.

GRANT against DAVIDSON.

WILLIAM DAVIDSON having been guilty of fornication, agreed to pay to Gregor Grant, the kirk-treasurer of the parish in which he resided, a small sum for behoof of the poor; intending, in this manner, to quash any action which might have been instituted against him in the civil courts, for the penalties imposed by 1661, cap. 38., and likewise to prevent his being prosecuted before the tribunals of the church.

He afterwards refused to fulfil this agreement, on the ground of its being illegal; and

No 102. *Pleaded* in defence, Kirk-sessions are not warranted, in a judicial capacity, to impose pecuniary fines on persons guilty of fornication. They are equally unauthorised to compound, extrajudicially, those penalties which may be levied in the civil courts, in virtue of the statute of 1661. Indeed, this last must be quite inept and ineffectual; for as these fines are recoverable by a popular action, no private agreement with one person can hinder a subsequent prosecution at the suit of another. Viewed, too, as a pecuniary commutation of penance, such a transaction as the present is liable to much exception. It seems equally inconsistent with the purpose of discipline, as with the genius of our ecclesiastical policy. See 10th *Annæ*, cap. 6.

Answered for the pursuer, Though kirk-sessions are not authorised to impose fines for offences of this nature, they have become as legal guardians of the poor's funds, the only prosecutors for those which, by the statute 1661, may be inflicted by the justices of the peace, and other ordinary judges. If, then, such penalties may be recovered, and are in fact exclusively sued for by the kirk-sessions, no reason can be given, why the party liable may not agree to pay to them without a prosecution.

Neither is it of any importance in the present question, that after an agreement of this sort, the delinquent is generally understood to be discharged from ecclesiastical censures. Of this species of punishment the civil courts have no jurisdiction or cognisance. It belongs to the superior judicatories of the church alone, to put a stop to these proceedings in kirk-sessions, when appearing to interfere with the spiritual welfare of the people.

The LORD ORDINARY found, "That the debt being contracted by way of transaction, to free the defender, as well from any prosecution before the justices of the peace, as from any ecclesiastical inquiry into his conduct, cannot be enforced by this Court; reserving to the pursuer, and all others concerned, to insist in a proper action before the justices of the peace, or other judges competent."

A reclaiming petition having been preferred, which was followed with answers, it was

Observed on the Bench, As the practice of bargaining with kirk-sessions, for irregularities of this kind, has long prevailed in Scotland, and the money thence arising forms a very considerable branch of the poor's funds; so there do not appear sufficient legal grounds for preventing it in future.

THE LORDS altered the judgment of the LORD ORDINARY, and found the defender liable.

Lord Ordinary, *Hailes*.
G.

Act. *W. Miller*.
Fol. Dic. v. 4. p. 30..

Alt. *Honyman*.

Clerk, *Robertson*.

Fac. Col. No 291. p. 447.

1787. July 12.

JOHN HALL and the PROCURATOR-FISCAL of the Sheriff-Court of Roxburghshire,
against JOHN BILLERWELL.

BILLERWELL, a shopkeeper, and other traders in the town of Jedburgh, entered into a combination, by which they agreed to refuse the accepting of such halfpence as were of the coinage of the present King. The reason assigned for this resolution was, that there were then great numbers of counterfeits of that coin in circulation, which it was extremely difficult to distinguish from the genuine halfpence.

Hall having proffered to Billerwell, for some of the articles in his shop, several pieces, bearing the impression of the halfpence of his present Majesty, the latter rejected them with disdain; upon which Hall, with the concurrence of the procurator-fiscal, applied by petition to the Sheriff, complaining of the above-mentioned combination, and of this incident, which was the consequence of it; and praying, that Billerwell might be found liable in damages to him, and in a fine to the public.

The cause was brought under the review of the Court; when, after inspection made by the officers of his Majesty's mint, of the halfpence in question, and a report given by them, bearing, "That though they had good reason to believe the halfpence to be genuine coins, yet their appearance was not without suspicion."

The LORD ORDINARY assolizied the defender.

The pursuers having reclaimed against this interlocutor,

The Court "adhered to it, so far as respected Hall, the private pursuer; but found the combination entered into by the respondent, not to receive in payments the copper coin of his present Majesty, George III. was improper and illegal; therefore fined and amerced him in the sum of L. 5 Sterling to the poor of the parish of Jedburgh; and farther found him liable in such expenses as the procurator-fiscal should depone he laid out previous to the date of this interlocutor."

Lord Ordinary, Swinton.
S.

Act. G. Fergusson.

Alt. Maconochie.

Clerk, Home.

Fol. Dic. v. 4. p. 36. Fac. Col. No 338. p. 519.

1798. December 11.

The CORPORATION of MASTER-SHOEMAKERS in Edinburgh, against
THOMAS MARSHALL and Others.

In 1797, a few of the superior workmen among the journeymen shoemakers of Edinburgh insisted for a rise of wages, to which their masters yielded; but

No 103.

Combination
against re-
ceiving mo-
ney of a par-
ticular coin-
age, illegal.

No 104.

Where jour-
neymen in a
body give up
working with

No 104.

a view to force a rise in their wages, the Judge Ordinary, in order to break the combination, may ordain them to return for a limited time to the service of their former masters, although they should have been under no contract to do so, unless satisfactory reasons for not returning can be pointed out by individual journeymen.

their example being followed by the other journeymen, the master shoemakers held a general meeting in 1798, at which they formed a scale of wages, which was to take place in all their shops on a specified day. The wages thus fixed were lower than they had given to some of their workmen in the preceding year, but higher than at any former period. At this meeting, the masters also entered into other regulations to prevent the journeymen from raising their wages.

In consequence of these measures, almost all the journeymen shoemakers in Edinburgh, and its vicinity, at once gave up working for their masters. It appeared, that many of them were members of a society connected with others of the same kind in England and Scotland, from the funds of which they received assistance, while they remained idle. They also set up a shop without the liberties of Edinburgh, where they proposed to serve the public with boots and shoes made by themselves.

The Corporation of shoemakers complained of these proceedings to the Justices of Peace of the county, by a petition, craving, that the journeymen should be ordained to return to their work, and that the Justices would make a table regulating their wages.

The Justices, while they severely reprimanded the complainers for pretending to fix a general rate of wages by their own authority, which was in fact entering into a combination themselves, in order to check the combination of the journeymen, pronounced the following judgment; "Find, That except in one or two recent instances, no higher wages have been given than those contained in the scale proposed by the masters; and that the same, in the opinion of the Justices, affords a proper and reasonable allowance to the workmen: Therefore, ordain the journeymen to return to their respective masters, and work at the prices stated in said scale till further orders; with certification, if they fail, that warrant will be granted for incarcerating such of the journeymen till they find caution so to do: But in case the journeymen find themselves aggrieved, and wish the matter more fully investigated, allow them to instruct such circumstances as may entitle them to a higher rate of wages."

The journeymen having complained of this judgment by bill of advocation, the Lord Ordinary on the bills sisted procedure, and reported the cause, and the Court remitted it to his Lordship to pronounce the following judgment: "The LORD ORDINARY, in terms of the remit from the Court, passes this bill, to the effect of trying the question as to the rate of wages, and the means that may have been used by either of the parties for increasing or diminishing them; but recalls the sist, that the decree of the Justices of Peace may be carried in to execution, to the effect of obliging the journeymen to work; in the mean time, at the prices stated in the scale or table, given in by the original pursuers, reserving the claim of the journeymen to the increased wages demanded by them till the issue of the cause; and to prevent any dispute about the

amount thereof, ordains the pursuers every Saturday evening, when they pay their journeymen their interim wages, to furnish them with a note of the wages reserved: And ordains the pursuers to find sufficient caution in the clerk's hands for payment of these reserved wages, in the event of the same being found due."

Notwithstanding this judgment, a great proportion of the journeymen having still refused to return to their former masters, the Corporation presented a complaint to the Sheriff against Marshall, Culbertson, Arnot, Henderson, and five others, who appeared to them to be the ringleaders of the association.

The Sheriff ordered them before him for examination.

Marshall declared, that he would not return to his former master, "because he considered it as an act of oppression to be bound to work for any given time to any master."

Culbertson declared, that he was willing to work to his former master at the wages he had for some time past received, which were higher than those fixed by the Justices, but not otherwise.

Arnot "declared, that about four or five months since, he entered as a free-man with the Incorporation of Calton; and that he was not willing to return to his former master upon any wages, as he had more work of his own than he could overtake."

Henderson declared, that he had lately lost a friend who was a carter, "and was a good deal employed in driving his cars till another could be got;" and that he would have returned to his former master at the rate of wages fixed by the Justices, had it not been for that circumstance.

The other five declared, that they had full employment as shoemakers on their own account; that they were not, therefore, inclined to serve as journeyman to any master; that some of them were entitled by privilege to carry on business within the city; and that work done by the others was such as did not encroach on the rights of the Corporation.

The Corporation denied the facts stated by these five persons, while they on the other hand offered to join issue in a proof of them.

The Sheriff granted warrant for committing to prison the whole nine persons complained of, "ay and until they respectively find caution acted in the Sheriff-court books of Edinburgh, that they shall return to, and work to their masters, in whose employment they were upon the 27th day of October last, when the masters' scale of wages was proposed to the journeymen; and that in the same way they did prior to that date, and that at the same wages, and on the terms mentioned in the interlocutor of the Court of Session of the 28th *ultimo*, and that for one month at least, from the time they shall begin to work, their said masters always giving them constant work, and implementing their part of said interlocutor in all points."

No 104.

The defenders presented a bill of suspension against this judgment, which, with answers for the Corporation, and replies, the Lord Ordinary on the bills took to report.

Pleaded for the complainers; The combination of the journeymen is entirely at an end by returning to their work. They are under no contract to serve their former masters, and it is a matter of perfect indifference to the community, whether they work to one master or to another, or on their own account. The Sheriff's interlocutor, in fact, adjudges their service to particular persons for a limited time, which is neither justified by the former judgment of this Court, nor consistent with the liberty of the subject.

Answered; It is undoubtedly true in the abstract, that every individual may change his master or his profession whenever he thinks fit. But the judgment of the Sheriff is the result of the extraordinary situation into which matters were placed by the combination entered into by the complainers themselves and their associates, which makes it necessary, in order to destroy it, that they should be ordained for a limited time to return to their former masters; case of *Brewers of Edinburgh* in 1725. For if the pretences held out by the complainers, of entering into a different line, or of having plenty of business on their own account, are sustained, a plausible reason for remaining idle will never be wanting to any member of the combination. If there be any hardship in the Sheriff's judgment, the complainers have their own improper conduct alone to blame for it.

THE LORDS, while they had no doubt but that every journeyman might quit his master's service *debito tempore*, were equally clear, on the ground stated for the chargers, that in the circumstances of this case, the Sheriff's judgment was right with regard at least to seven of the complainers. They thought, however, that the facts stated by Arnot and Henderson, if true, afforded a sufficient reason for their conduct. They, therefore, unanimously passed the bill of suspension as to these two complainers, and refused it as to the rest.

Lord Ordinary, *Cullen*.

For the Corporation, *Hope, Monypenny, Inglis*.

Alt. *H. Erskine, Fletcher*.

R. D.

Fac. Col. No 97. p. 227.

No 105.

A parochial schoolmaster holds his office *ad vitam aut culpam*, and an obligation taken from him by the heritors,

1799 February 20. LEWIS ALEXANDEE DUFF against Sir ARCHIBALD GRANT.

THE parochial schoolmaster of Monymusk, on his appointment in 1782, wrote a letter to the late Sir Archibald Grant, the sole heritor of the parish, in which he admitted, that he had been taken on trial till the next term, and was afterwards to hold the office at the pleasure of Sir Archibald. He at the same time renounced all views of becoming a clergyman.

On his voluntarily resigning the office in 1792, the minister of the parish wrote to Sir Archibald, then in England, soliciting him to appoint his son, Lewis Alexander Duff, to the school. In consequence of the answer received, (which was not afterwards produced,) Mr Duff entered to the duties and emoluments of the office.

No 105.
to remove
from it at
their plea-
sure, is not
binding.

In 1795, he had become a preacher, and he was summarily expelled from the school by the present Sir Archibald Grant, in consequence of orders from his father, upon an allegation of misconduct.

He afterwards brought an action against the late and present Sir Archibald Grant, concluding to have his right to the office declared to be *ad vitam aut culpam*, and for damages.

The defence was, that the pursuer had never been regularly elected, but had been taken on trial, and during pleasure, like his predecessor, and must submit to the condition of his appointment.

Answered; The pursuer was admitted with the concurrence of the sole heritor and minister of the parish. There was, therefore, no occasion for a formal minute of election. His appointment was unconditional; and the burden of proving the contrary lies with the defender, who has produced no evidence of it.

Besides, a parochial schoolmaster is a public officer, who holds his office *ad vitam aut culpam*, and is subject only to the jurisdiction of the presbytery for his deportment. Any stipulation exacted from him, making him dependent on the heritors, would be disregarded as illegal.

The Lord Ordinary reported the cause on informations.

The Court were clearly of opinion, that the pursuer's plea was well founded, both in fact and in law. It was at the same time observed, that though heritors cannot effectually stipulate, that a parish schoolmaster shall be removable at their pleasure, this will not preclude the competency of their taking one for a few months on trial.

THE LORDS "found, that the pursuer is parochial schoolmaster of the parish of Monymusk, and entitled to hold that office, and to all the emoluments thereof, *ad vitam aut culpam*;" and therefore found the defender liable in damages and expenses.

Lord Ordinary, *Glenlee*.

Act. *W. Robertson*.

Alt. *G. Ferguson*.

Clerk, *Menzies*.

D. D.

Fac. Col. No. 114. p. 259.

S E C T. XV.

Forstalling.—Simoniacal Practices.—Obligation by a Minister not to bring an Augmentation.

No 106.

1594. *December.* — L. MERTON *against* TOWN of LAWDER.

VICTUAL once presented to the market, being thereafter housed, the LORDS found, that, if any forstaller bought it betwixt market days, the Magistrates might escheat it, without incurring spuilzie.

Fol. Dic. v. 2. p. 19. Haddington, MS.

* * * See this case, *voce* SPUILZIE.

1759. *February 20.*

ROBERT STEVEN *against* STEWART LYELL, JOHN GARDINER, and ROBERT PEIRSON.

No 107.

The friends of a clergyman bound themselves, by a letter, to the heritors of a parish, of which the Crown was patron, to procure a gift of a year's vacant stipend for reparation of the church and manse, provided that, by the interest of these heritors, their friend, the clergyman, should obtain the presentation. The Court found that no action could lie on this obligation, but fined the defenders in L. 10 to the poor.

THE parish of St Vigian's, of which the Crown is patron, became vacant. Two several candidates solicited the heritors, in order to procure, by their interest, a presentation. The friends of one of the candidates offered to the heritors a year's vacant stipend for repairing the kirk, kirk-yard dykes, and manse, provided they would procure the presentation for him. John Gardiner and Robert Peirson, who were the friends of the other candidate, were constrained, by some of the heritors, to agree to the same terms; and gave power to Stewart Lyell to enter into an agreement to that purpose; which he did by a letter in the following terms: "Gentlemen, In consideration of certain favours granted me by you, I hereby oblige myself to procure you a gift to a year's vacant stipend of the parish of St Vigian's, on occasion of the present vacancy, or otherwise to pay you the same, or what part thereof I do not procure you a gift to, out of my own pocket, and that how soon a year's stipend becomes due, after the widow of the last incumbent has got her *ann*, to be applied by you in repairing the church and manse,' &c. Addressed, To Mess. Stephen and Strachan, and the other heritors of the parish of St Vigian's.

The presentation was obtained, and an application was made to the presbytery by the heritors to delay the settlement, that some vacant stipend might arise. The presbytery having heard of the transaction, refused this; but though they completed the settlement, they commenced a process against the

minister, as guilty of simony ; in the course of which it appeared, that the minister was not privy to the transaction made by his friends ; and therefore he was acquitted.

The reparation of the church having afterwards amounted to a considerable sum, Robert Stephen brought an action before the Sheriff, against Stewart Lyell, upon the above obligation, for payment of L. 38 : 5s. Scots, as Stephen's share of these repairs ; and Stewart Lyell, on his part, brought an action against Gardiner and Peirson, to relieve him of the consequences of Stephen's action.

The Sheriff " found Lyell liable for Mr Stephen's share of these repairs, and for expense of process ; and found Messrs Gardiner and Peirson liable to relieve Lyell."

The cause was removed from the Sheriff Court by advocacy. It was argued for Lyell, Gardiner, and Peirson, That no action could lie upon this obligation, because it had been granted *ob turpem causam* ; that it had been unduly extorted from the defenders by the heritors, and in particular by Mr Stephen the pursuer, and Mr Strachan, in order to relieve themselves, at the expense of the minister, of a burden to which by law they were subjected ; and that it would be of dangerous consequence to give support to such transactions, by which the small revenues of the clergy of Scotland might in time be reduced below what was necessary for their absolute subsistence.

Answered, The obligation was not elicited by the pursuer ; it had been insisted for, indeed, by Mr Strachan ; but, so far as the pursuer was concerned, it had been voluntarily granted ; for the pursuer had agreed to support this candidate long before the date of this obligation, though he signed the petition in his favour only of the same date.—That there was nothing improper or simoniacal in the transaction ; for as, upon such occasions, settlements are often postponed on purpose that vacant stipends may arise, which are, for the most part, granted by the Crown as patron, for repairing the kirk and manse, there could be nothing wrong upon the part of heritors, to make it a condition of their supporting a particular candidate, that they should not be deprived, by hastening his settlement, of the vacant stipends, of which they would otherwise have had the benefit.

THE LORD Shewalton Ordinary, found, " That the obligation was granted *ob turpem causam* ; and that no action could lie upon it ; and in respect of Lyell's concurrence in the unlawful paction, which was the cause of granting the obligation, found no expenses due to him ; but amerced the pursuer in L. 10 Sterling to be paid to the poor."

" THE LORDS adhered ; and imposed a fine upon Gardiner and Peirson."

Act. IV. Stewart.

Alt. Scrimgeour.

IV. 7.

Fol. Dic. v. 4. p. 25. Fac. Coll. No 174. p. 310.

1775. *January 19.*

DAVID MAXWELL of Cardiness, in his own name, and as Attorney for the Reverend Mr WILLIAM THOMSON, *against* JOHN Earl of GALLOWAY, and JAMES GORDON of Balmeg.

No 108.

What deemed
a simoniacal
paction con-
cerning a pre-
sentation to a
vacant
church.

IN the year 1769, the parish of Anwith, in the stewartry of Kirkcudbright, having become vacant, Mr Maxwell of Cardiness, the patron, intended presenting Mr Thomson, then minister of the presbyterian meeting at Workington, in Cumberland.

James Gordon of Balmeg had a son, William, then a probationer, whom he was desirous of having settled, as a parish minister; and, having a political connection with the late Earl of Galloway, he applied for and obtained his interest to promote this plan for his son. And Mr Maxwell the patron, though unacquainted with Balmeg, willing to oblige Lord Galloway, agreed to give the presentation to Mr Gordon, upon his Lordship's application, and offered to grant an obligation to pay Mr Thomson, whose English cure did not produce above L. 20 Sterling yearly, an equivalent to the difference of the profits of these two cures, until Mr Thomson should be better provided.

Matters being thus settled, the late Earl of Galloway wrote and delivered to Mr Maxwell a letter of the following tenor: ' Galloway-house, 1st September 1769. Sir, As I am anxious to have Mr William Gordon of Balmeg settled in the parish and kirk of Anwith, of which you are patron; at the same time, I am perfectly sensible of your inclinations to serve Mr Gordon, and oblige me; yet, as you wish to do a friendship for Mr William Thomson, minister of the Presbyterian meeting at Workington in Cumberland, I promise that, upon your settling Mr Gordon in the parish and kirk of Anwith, to pay to Mr Thomson the sum of L. 20 Sterling yearly during all the days of his life, or until he is provided in a parish and kirk in Scotland; and, if he refuses to accept of a presentation, to have the same effect as if he had been settled; and this annuity to continue during Mr William Gordon's life, and his being continued in the possession of the parish and kirk of Anwith. But in the events, either of Mr Thomson's not accepting of a presentation, or death, or being otherwise provided, or of Mr Gordon's removal from Anwith, or his death, this obligation to be void and null; the first half year's payment of Mr Thomson's annuity, to wit L. 10 to be payable when Mr Gordon is entitled to, and has a right to half a year's stipend, and so yearly and termly thereafter; and I farther promise, to grant an obligation on stamped paper, upon the above terms, when required.'

Of even date, Mr Gordon of Balmeg, being then also at Galloway-house, wrote and delivered the following letter of relief to the Earl: ' Galloway-house, Sept. 1st 1769. My Lord, As your Lordship has granted your obligation to Mr Maxwell of Cardiness, to pay to the Rev. Mr William Thomson, Presby-

‘terian minister in Workington, Cumberland, the sum of L. 20 Sterling yearly, upon Mr Maxwell’s settling my son William minister of Anwith, and that said L. 20 is to be paid yearly and termly until Mr Thomson is presented to a kirk in Scotland, or otherwise provided in England, or till the event of Mr Thomson’s death, or the event my son’s death, or his leaving the parish of Anwith; and as your Lordship has been so kind and friendly to me, to grant such obligation entirely to serve me, I hereby oblige myself to free and relieve your Lordship of said obligation, by paying you said L. 20 Sterling, yearly and termly, as above narrated. And I do hereby oblige myself to grant your Lordship an obligation, on stamp paper, in terms of the above, whenever your Lordship thinks proper to demand it.’

Mr William Gordon was accordingly settled in the parish of Anwith, prior to Whitsunday 1770; and Mr Thomson having granted a letter of attorney to Mr Maxwell, of date 15th August 1770, empowering him to uplift the fore-said annuity, he, in virtue thereof, received from the Earl, by the hands of James Gordon of Balmeg, one year’s annuity, falling due at Whitsunday and Michaelmas 1770, for which he granted a receipt in the terms above mentioned.

It appeared that, some time after the conclusion of the transaction, a letter was granted to Mr Maxwell by Mr Gordon of Balmeg, wrote after a scroll prepared by the former, (but without date, and the cause of granting whereof was differently accounted for by the parties,) in the following terms: ‘Sir, As Lord Galloway granted an obligatory missive letter to you, bearing date, at Galloway-house, Sept. 1st 1769, wherein his Lordship obliged himself to pay you, for behoof of the Rev. Mr William Thomson, minister of the Presbyterian meeting-house in Workington in Cumberland, L. 20 Sterling during his life, or till his Lordship procured him a presentation to any parish church within Scotland; providing always, that you presented and settled my son Mr William Gordon as minister of Anwith, as the said missive letter more fully bears; and, seeing you have fulfilled your part of the obligation, by settling my son minister of Anwith, it is but just and reasonable Mr Thomson should have his annuity regularly paid him; and, as I am satisfied that annuity should be regularly paid, without giving my good friend Lord Galloway any trouble, I hereby empower you, in name of my son, to pay Mr Thomson his annuity of L. 20 Sterling yearly, out of the teinds payable upon your estate in Anwith; and I hereby oblige myself, upon your producing Mr Thomson’s receipt for said sum of L. 20 Sterling, to procure you my son’s discharge for the teinds payable out of the estate, equal or effecting to the fore-said sum of L. 20 Sterling yearly. I am,’ &c.

Balmeg having refused payment of the second year’s annuity, Mr Maxwell had recourse to the Earl of Galloway, to accommodate whom, it is said, he had

No 108. agreed to the proposal, that he would accept of the annual payment for Mr Thomson by the hands of Balmeg, but conditionally, that he should have recourse upon his Lordship when he ceased to be punctual in his payments; and from him he received the following letter: ' Newton Stewart, August 21st 1772. Dear Sir, I expected to have had the pleasure of meeting you here at the races, and to have talked to you fully in regard to Balmeg's refusing to pay the annuity that he and I bound ourselves to pay to you for Mr Thomson's behoof. I have had another communing with Balmeg, and he tells me plainly that he will never pay one farthing of it till he is compelled by a decret. As that is the case, surely it is more just and reasonable that you insist against him than against me, especially as he begun the payment with you, and you received one year's annuity from him, and gave him a discharge for it. I am perfectly pleased that you give us both a summons upon our obligatory letters. I shall make no defence, only so far as to fix the payment upon Balmeg, and relieve myself, which I think will be easily done, and be most obliging to me; and you will pardon me for refusing to pay upon any other terms. I remain, Dear Sir,' &c.

Mr Maxwell, in December 1772, brought the present action, founding upon the *species facti* above narrated, and particularly upon the Earl of Galloway's holograph obligatory missive, of date Sept. 1st 1769, above recited, and concluding against the Earl alone for payment of the two years' annuity then due, and for continuing the allowance agreed to be paid to Mr Thomson in time coming, under the conditions in the above recited letter. Lord Galloway having died during the dependence of this suit, the action was awakened, and transferred against the present Earl his son, and compearance was made in it for Mr Gordon of Balmeg, who was admitted to be heard for his interest in this cause. Lord Galloway likewise brought an action for relief against Balmeg, who, acknowledging his being liable in such relief, likewise undertook the defence of Lord Galloway; and

Pleaded; That the stipulation was simoniacal; that, as such, it was reducible by the canon law, and by the municipal law of this kingdom, which, it was maintained, had received and adopted the canon law so far as related to simony, 1st act, Parliament 1612; as had also the Church of Scotland, by acts of Assembly 1753 and 1759; And, in a case that lately occurred, apparently more remote from simony than the present, because neither patron nor presentee were privy to nor in the knowledge of the paction, the decision proceeded on the principles of the canon law, adopted in the above acts by the General Assembly, Steven *contra* Lyell and Others, 20th February 1759, No 107. p. 9578.

Answered; That it was not a simoniacal paction; for that the patron had not directly put money in his pocket, but only, by disposal of his patronage, had procured a comfortable subsistence to a poor friend, and relation of his family; and, 2dly, That the whole transaction was without authority, or the least

knowledge of the presentee, and, therefore, a fair and honourable transaction, which the law would support. No 108.

THE COURT pronounced the following judgment :

“ THE LORDS find, that the transactions within mentioned, between the Earl of Galloway and Mr Maxwell of Cardiness, and James Gordon of Balmeg, and also the subsequent transaction between the said Mr Maxwell and James Gordon, were all simoniacal pactions, entered into *ob turpem causam, et contra bonos mores*, and, therefore, that no action lies upon the obligations granted relative thereto : Dismiss this action, assolzie and decern ; but, in respect of the accession of the said Messrs Maxwell and Gordon to said transactions, they fine and amerciate Mr Maxwell in L. 30 Sterling, for the use of the poor ; and also Mr Gordon in L. 60 Sterling, for the use of the poor ; which sum they decern to be paid to David Ross, clerk to this process, to be disposed of as the Court shall think proper ; and declare, that all execution necessary shall pass at Mr Ross' instance, for recovery thereof.” Thereafter,

James Gordon having reclaimed, the Court, in consideration of his particular circumstances set forth in his petition, modified the fine formerly imposed upon him to L. 30 Sterling.

Act. *Walt. Campbell, Al. Murray.*

Alt. *Dav. Dalrymple.*

Clerk, *Ross.*

Fol. Dic. v. 4. p. 25. Fac. Col. No 150. p. 9.

1794. *Janaary 22.* The Rev. DR BOYD against The EARL OF GALLOWAY.

IN 1769, the Earl of Galloway, patron and titular of the parish of Penninghame, granted a bond of annuity for L. 20 to Dr Boyd, the minister, which he afterwards gave up on receiving L. 300 Sterling.

Of the same date with the bond; the minister granted a missive to the Earl binding himself ‘ never to ask or sue for any augmentation of glebe or stipend.’

The Doctor, nevertheless, having brought a process of augmentation, the Earl, in bar of it, founded on the missive.

The Court, considering the transaction as *pactum illicitum*, repelled the objection.

The Earl, in a reclaiming petition,

Pleaded ; A minister is the unlimited proprietor of his stipend. He may assign it either gratuitously or for an onerous cause, during his life, although he should thereby render himself incapable of supporting his rank. As therefore an assignation from the pursuer, conveying to the Earl his whole stipend, on

No 109.

An obligation granted by a minister not to bring a process of augmentation in consideration of a sum of money received by him from the patron, is not binding.

No 109. receiving the L. 300, would have been binding on him, *a fortiori* must the mis-
sive in question, which only precludes him from augmenting it.

The interest of the benefice is not hurt by the bargain. On the contrary
by means of it the heritors will not have it in their power to plead a recent aug-
mentation against the next incumbent, who from the progressive improvement
of the country, will be entitled to a larger stipend than the present pursuer
could have expected.

THE LORDS refused the petition without answers.

For the Petitioner, *Dean of Faculty Erskine.*

R. D.

Fol. Dic. v. 4. p. 25. Fac. Col. No 97. p. 217.

See No 8. p. 331.

Bribery at burgh elections ;—*See BURGH ROYAL.*

Tutors and curators purchasing in the minors' debts ;—*See TUTOR and PUPIL.*

Usurious contracts ;—*See USURY.*

See FRAUD.

See APPENDIX.

APPENDIX.

PART I.

PACTUM ILLICITUM.

1776. February 8. WILLIAM DUNCAN against DAVID THOMSON.

DAVID THOMSON, merchant in Dysart, was, in the beginning of 1772, engaged, along with Daniel Fox, at that time residing in St Andrew's, in an adventure to the extent of sixty chests of tea, of which thirty chests were shipped for behoof and at the risk of Thomson, and the other thirty for behoof and at the risk of Fox.

NO. 1.
Action denied upon a bill granted for smuggled goods.
See No. 83.
P. 9546.

The tea arrived in safety ; and the thirty chests belonging to Mr Fox were lodged in a house in St Andrew's, said to belong to his father-in-law, William Duncan, merchant in that town. A short time after, Fox found it necessary, from some circumstances, to leave this country, and settle in Holland. Previous to his departure, he asked of Thomson to take the whole tea, and allow him his share of the profits. To this Thomson agreed ; and a calculation of the profits being made out, granted a bill to Fox, payable three months after date, for L. 102, 6s. Sterling, as the probable amount of his share of the profits.

Thomson, in consequence of this agreement, went to St Andrew's a few days afterward to receive the tea. By this time, however, Fox had left the country, and Thomson being ignorant of the place where the tea was lodged, and not caring to make any public inquiry concerning it, upon his return home, wrote to Fox, desiring immediate information where the

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No. 1. goods were, and demanding their instant delivery. Soon afterward the goods were seized.

Upon this William Duncan, to whom the bill above mentioned had been indorsed by Fox, gave Thomson a charge for payment. Several creditors also of Duncan, hearing of this charge, laid arrestments in Thomson's hands to a much greater amount than the sum in the bill, in consequence of which, Thomson brought a multiplepoinding, and likewise offered a bill of suspension of the charge against him.

In discussing this suspension, it appeared that Duncan acted only as trustee for Fox ; and Thomson the suspender accordingly contended, that every objection formerly competent against Fox was now competent against the indorsee, and that the exception against a charge for payment of the profits of the tea was sufficiently supported, upon the ground that there was no delivery of the goods, and that the original cost of them had never been paid, Thomson having advanced the whole of it to the foreign merchant. After some procedure before the Lord Ordinary, and upon advising a condescendence and answers, he found the letters orderly proceeded, and decerned.

In a reclaiming petition, in which the suspender insisted chiefly upon the circumstance that there had been no delivery, and that it is the acknowledged law and practice of this country, that the sale of no moveable is completed, but by delivery thereof to the purchaser, he contended, that he could not therefore be liable for any loss through the seizure of the tea, so long as it remained undelivered in the custody of Fox, or those to whom he delivered it.

The Court did not seem satisfied with this defence, and the petition was accordingly refused.

In a second reclaiming petition, the suspender went upon other grounds. As he had maintained formerly that there was no delivery, so now he maintained that there was no sale ; that bills in their own nature imply a value received ; that it is a solid objection to a bill that it is *sine causa*, and that when granted in the view of something to be performed, if the stipulation on the part of the drawer be not performed, the bill becomes void, and cannot be the ground of action or diligence.

Besides this, he further argued, that action does not lie for sales of goods that are known to be smuggled. This, it was observed, is a question which falls to be determined rather upon the principles of the English law, than upon those of the law of Scotland, the whole of our revenue laws being English; and the consequences therefore that result from them, being deducible only from the law of England. And a case was mentioned, which had been decided on the 1st of November 1775, before Mr Justice Gould, by a special jury, in which the plaintiff having smuggled a parcel of

muslins, and the defendant, even after receiving the goods, having informed the officers of the revenue that they were smuggled; upon the plaintiff bringing his action for the price, the judge and counsel on both sides agreed, that it was established by many precedents, "that no person selling "smuggled goods, can ever bring an action legally to recover of the purchaser, the property of such goods being at all times his Majesty's." This, it was said, was altogether consonant to the genius of the English law, by which it is understood, that the forfeiture takes place *ipso facto*, while the sentence of condemnation is no more than declaratory, and according to which the forfeiture is made effectual, even against an onerous *bond fide* purchaser.

In opposition to these arguments, the pursuer contended, That the transaction between the parties was truly a sale by Fox to the suspender of his share of the goods: That had there been no sale, and had the suspender only undertaken to dispose of the goods for Fox's behoof, as well as his own, and account to Fox for his share of the profits arising from the sale, he would have granted him an obligation to that purpose, and never would have come under a simple acceptance for a sum of money; and that therefore, the only question to be determined was, whether or not action lies against the defender for payment of his accepted bill; or, in other words, whether, because the goods were smuggled, Fox was by law prohibited to sell, and the suspender by law prohibited to purchase them.

Upon this point the pursuer argued, That smuggled goods, though they be by law liable to seizure, are not yet put *extra commercium*; and to establish this, a decision 27th November 1723, the Commissioners of the Customs against Mr John Morrison, No. 75. p. 9533, was particularly appealed to. In this case, the question which came under the consideration of the Court, was, whether a legal security given for the price of uncustomed goods, known to be such by the purchaser when he bought them, is effectual; or if, on the contrary, is void and reducible. And here the judgment of the Court was, "That action on the bills in question for the "price of run goods, though bought as such, is competent." Another decision also, 27th February 1757, Walker against Falconer, No. 80. p. 9543, was founded upon, in which action had even been sustained for the price of smuggled goods sent into this country upon commission.

It was further, and, lastly, argued for the pursuers, That the present action was not brought for implement of a smuggling contract, but for payment of a bill granted, as is supposed, for the price of smuggled goods. For that a smuggling contract, which is reprobated by the law, and for implementing which it refuses to give its aid, can mean only a contract or agreement entered into for the purpose of smuggling goods; whereas the present case

- No. 1. has no relation to the smuggling of goods, but is an action for payment of the price of goods which were already smuggled.

For the suspender, it was replied, That the decision, Commissioners of the Customs against Morrison, founded on by the pursuer, was of a singular nature ; that the defence was not proponed by the party to the suit, but by the Commissioners of the Customs, who had no interest whatever in the matter ; and that the Court, therefore, were not entitled to take up the consideration of the general point, when it was waved by the party having interest. The interest of the Crown, or of the public, besides, was, in this case, fully satisfied, the goods having been seized and confiscated, and the contract, properly speaking, was not a smuggling contract, as it contained no stipulation in defraud of the revenue. The case thus being dissimilar, would not apply.

As to the distinction made by the pursuer, that the present action is not an action for implementing a smuggling contract, but an action for payment of a bill, this, it was said, created no essential difference. In all bills, it is competent to inquire into the cause of granting. If it be not a proper onerous cause, the bill will be set aside, and if granted for an illegal cause, it must be held to be void. A bill for a game debt, thus, upon the cause of granting being ascertained, would be held as void ; and in the same manner, where it is granted in consequence of a contract which the law holds as void, and upon which it refuses action, no action will lie on the bill. Were it otherwise, the law might in all cases be frustrated, by taking a bill in consideration of an unlawful contract, by which means, that action which the law refuses on the contract, would arise upon the bill.

The Lords found, " That no action lies in this case, in respect the same " is brought between smugglers for implement of a smuggling contract ; " and therefore suspend the letters *simpliciter*, and decern." And to this interlocutor the Court adhered, on advising a reclaiming petition and answers.

Lord Ordinary, *Gardenstone.* Aft. *Nairne, Neil Fergusson.* Alt. *Crosbie, Maconochie.*
J. IV.

* * * There is another case under the title PACTUM ILLICITUM, falling under the period, the decisions of which were wanting in the Faculty Collection, viz. 3d December 1776, Hope against Tweedie, No. 66. p. 9522., for the particulars of which, reference is made to this Appendix ; but the editor has not hitherto been able to obtain the session papers. See Appendix, Part II.

1800. *November 14.*MARY SCOTT and ROBERT AITCHISON, *against* DAVID KYLE.

No. 2.

A person having purchased a house, on condition, that if the price was not paid by a particular time, he should be bound, at the option of the seller, either to pay the price, or a sum equal to the quantity of Government stock which the price would have purchased at the date of the sale, with the interest of the price from the day of sale, and a further sum, equal to the difference between the legal interest and what the seller would have drawn as interest, had the price been invested in the funds when the sale took place; the bargain was found to be void, both as usurious, and as falling under the 7th Geo. II. c. 8., annulling wagers with regard to the price of the public funds.

By a minute of sale, dated 19th March 1798, Mary Scott, and her husband Robert Aitchison, agreed to sell to David Kyle, a tenement of houses in the town of Melrose. The price was L. 400, and the sale was to be held as having been concluded on the 24th February preceding. The obligation by the purchaser as to the payment of the price, was in the following terms: "For the which causes, and on the other part, the said David Kyle has made payment to the said Mr and Mrs Aitchison, of the sum of L. 100 Sterling of the price, with interest from the said 24th day of February last, as agreed upon; and he binds and obliges him and his heirs, &c. to make payment to the said Mr and Mrs Aitchison, their heirs, &c. of the further sum of L. 300 Sterling, and that against the term of Martinmas next, with the legal interest of said sum from the said 24th day of February last to the said term of payment, and, if necessary, he shall grant bond to that effect; declaring always, that if the said David Kyle finds it inconvenient for him to pay the said money at the foresaid term of Martinmas next, he shall be further indulged; only when he does settle thereafter, he must then pay of the price, as much money as will at the time buy the same quantity of Government stock in the 3 *per cent.* consols, as L. 300 would have bought on the said 24th day of February last, or pay just L. 300, in the option of the said Mr and Mrs Aitchison; and the said David Kyle shall, at same time, pay the legal interest effeiring to the L. 300 from the said 24th day of February last, and also, a sum equivalent to what Mr and Mrs Aitchison lose between the legal interest and what they might have drawn, had L. 300 been lodged in said funds on the foresaid 24th day of February last; and to save after disputes about what the rate of said stock was on the foresaid day, it is here held to have been 48 $\frac{1}{2}$, which shall be the rule for determining the above points, and as to what shall be the rate of stock at the time of settlement and payment, the rate last stated in the Edinburgh Evening Courant preceding the day of settlement, shall be held as the rate at settling; and it is declared, that the settlement by payment shall be delayed no longer than Whitsunday 1799 years, otherwise the said Mr and Mrs Aitchison shall be at liberty to void the bargain, and resume the subjects, or prosecute for implement in the above terms, in their option; and David Kyle is to have no claim to have back said L. 100 advanced."

Kyle did not pay the L. 300 with interest at Martinmas 1798, and matters were allowed to lie over till July 1799, when Mary Scott and her hus-

No. 2.
—A penalty
stipulated
for the non-
performance
of an illegal
contract will
not be enfor-
ced.

band brought an action against Kyle, concluding, that as the term of Whitsunday 1799 had elapsed, without the defender paying the balance of the price, the bargain should be declared void, and the pursuers found entitled to resume the possession of the subject, and retain the L. 100 which had been paid to account of the price, all in terms of the minute of sale.

In November 1799, Kyle, with a view to stop the action, offered to pay the L. 300 of the price which remained due, with interest from the date of the transaction; but the Government stock mentioned in the minute of sale, having by this time risen to $62\frac{1}{4}$, the sellers refused to settle with Kyle, unless he would pay them the following sums, which they contended they were entitled to, in terms of the minute:

At $48\frac{1}{2}$ per cent., the rate fixed by the minute of sale, the L. 300 would have purchased L. 618, 11s. of Government stock, but, at the rate of $62\frac{1}{4}$, it would require

L. 385 0 11

Besides, the pursuers demanded legal interest of the L. 300

from 24th February 1798, to 30th November 1799, - 26 9 3

And also the difference between the legal interest and the in-

terest which they would have actually received, had the

L. 300 been employed for their behoof in the purchase of

stock, on the 24th February 1798, being

6 5 5

L. 417 15 7

In place, therefore, of L. 326 : 9 : 3, which the defender was willing to have paid, the pursuers demanded L. 417 : 15 : 7; and the action having accordingly been insisted in, Kyle, in defence,

Pleaded: *1st*, The contract by which the sale was concluded is void, as falling under the 7th George II. c. 8 § 1., which declares, "That all contracts and agreements whatsoever, which shall from and after the 1st of June 1734, be made or entered into by or between any person or persons, upon which any premium, or consideration in the nature of a premium, shall be given or paid for liberty to put upon, or to deliver, receive, accept or refuse any public or joint stock, or other public securities whatsoever, or any part, share or interest therein, and also all wagers, and contracts in the nature of wagers, and all contracts in the nature of puts and refusals, relating to the then present or future price or value of any such stock or securities as aforesaid, shall be null and void to all purposes whatsoever."

2dly, The contract is also void, in terms both of the act 1621, c. 28., and the 12th Anne, statute 2. § 16., as being usurious in two respects; *1st*, By stipulating for interest on the L. 300 from the 24th February 1798, although that sum only became due at Martinmas thereafter; *2dly*, By stipulating not only for legal interest, but also for a sum equal to the difference between the

legal interest and that which they would have drawn, had the L. 300 been vested in the funds on the 24th February 1798.

3dly, If the contract is illegal and usurious, it must be null *in toto*, and therefore, that part of it by which the defender was to forfeit the L. 100 paid by him to account of the price, in case he did not fulfil the bargain, must be also void.

The pursuers stated, in point of fact, That when the sale took place, they were desirous that the whole price should have been paid; in which case, as the Government funds were very low, it was their determination to have employed it in the purchase of stock: That the defender knew this, and that the delay in the payment of the price, was agreed to merely for his accommodation, and only upon his suggesting the mode of settlement stipulated in the minute, by which they were just to receive the same advantage as if their money had been applied at the time of the sale, in the manner which they had projected.

In point of law, they

Answered: 1st, The statute 7th Geo. II. c. 8. was meant solely to strike against wagers upon the rise or fall of stock, where the parties had no interest in them. But here the stipulation relates to a sum of money which was *bond fide* destined to be vested in the funds. The pursuers, therefore, having had a fair and substantial pecuniary interest in view by the contract, it neither falls within the words nor the spirit of the statute; Termly Reports K. B. Vol. 8. Part 2. p. 162. *Kentis v. Hawsley*, 8th February 1799.

2dly, Kyle, by the minute of sale, became bound to pay the balance of L. 300, with legal interest at Martinmas. Had he done so, the transaction would have been completely unexceptionable. But the laws against usury do not apply to cases where the obligee is taken bound to heavier prestations only in case of failure, such prestations being regarded, not in the light of an unlawful usance, but as damage which, it is agreed, the obligee shall pay on account of breach of contract; Hume on Crimes, *voce* Usury, 22d January 1672, Skene*; 23d July 1679, Murray*.

3dly, But, at all events, the pursuers are not demanding, in this action, either a larger sum on account of the increased price of stock, or alleged usurious profits. The libel is founded entirely on that branch of the minute of sale which provides for the event which has actually occurred, of Kyle's failure in performance. The defender, therefore, is attempting to resist conclusions, founded, not on the alleged objectionable part of the contract, but on one which is not denied to be legal.

The Lord Ordinary found "the sale libelled void and null: Found, That "the defender must pay rent for his possession as formerly, and the pursuers must repay the sum of L. 100, and bygone interest due thereon::

* Cases in the Court of Justiciary.

No. 2. " Found the defender bound to remove from the possession at Whitsunday
" next, and decerns."

On advising a reclaiming petition, with answers, the Court were unanimous, that the contract was usurious; and, with the exception of one Judge, they were also of opinion, that it was struck at by the statute 7th Geo. II. All were agreed, that a penalty attached to an illegal contract could not be sustained.

The Court " adhered."

Lord Ordinary, *Stonefield.* A.C. Lord Advocate *Hopk, W. Scott.* Alt. *Monypenny, Tod.*

R. D.

Fac. Coll. No. 193. p. 443.

1804. November 16. CUMMING GORDON *against* CAMPBELL.

No. 3.
A wager is
not action-
able.

ON the 29th May 1797, a contract was entered into between Major-General Alexander Campbell of Glendaruel, and Lieutenant-Colonel Alexander Penrose Cumming Gordon of Altyre and Gordonstown, " That in case at
" any time, in the course of ten years from and after the date hereof, the
" value of L. 100 Sterling in that part of the British funds called the 3 *per*
" *cent.* consols, should rise, so as to be rated in the Stock Exchange, Lon-
" don, at above L. 70 Sterling, then, and in that event, the said Alexander
" Campbell shall be bound, as he hereby binds and obliges himself, his
" heirs, executors and successors whomsoever, jointly and severally, to pay
" to the said Alexander Penrose Cumming Gordon, his heirs, executors or
" successors, the sum of L. 100 Sterling, with the lawful interest thereof,
" from and after the time the same shall fall due by the said event, ay and
" until payment." And, on the other hand, Colonel Cumming bound him-
self to pay the like sum, if the 3 *per cents.* did not rise to L. 70.

This contract was formally executed on stamped paper, and recorded in the books of Council and Session.

General Campbell died in July 1801, and was succeeded by his brother Duncan. Within the time specified, the 3 *per cents.* rose above L. 70; and an action having been brought for fulfilment of the contract, the Lord Ordinary at first assolvied the defender, finding the contract not actionable in this Court; but afterward ordered informations.

The pursuer

Pleaded: Although an agreement at play might not be actionable in this country, still the present case is widely different. There was here no game:

it was a single wager, upon an event not created for the purpose of amusements and upon an event of the greatest importance. It has not one feature of a *sponsio ludicra*. It has nothing ridiculous in it; nothing unbecoming the dignity of the Court to examine. It is a simple and solemn contract, which creates a complete obligation in natural justice. Why, therefore, should it not be enforced in a court of justice? If such transactions be inexpedient, the Legislature alone can have the power to declare them void, as they did in certain cases, by 7th Anne, c. 15., and 19th Geo. II. c. 37. That wagers on a contingent event, or uncertain fact, are actionable, is expressly recognized by our law; Bankt. B. 1. Tit. 19. § 46., 9th February 1676, A. and B. No. 52. p. 9505.; Hope against Tweedie, 3d December 1776, No. 66. p. 9522.: as well as by the English Courts; *Da Costa v. Jones*, 31st January 1778, Cowper's Reports, p. 729.: *Good v. Elliot*, 3 Term. Rep. p. 693.

Answered: Though the attention of the Legislature has been confined to cases of gambling or horse-racing, common law has interfered in all cases of wagers, which, in fact, are nothing but gambling contracts, denying action on all cases which come under the description of a *sponsio ludicra*. Such rights are not founded on any consideration; they must be left entirely to the law of honour, as Courts ought only to enforce rights arising from serious and solemn grounds; Sir Michael Stewart against Earl of Dundonald, 7th February 1753, No. 61. p. 9514; Bruce against Ross, 26th January 1787, No. 67. p. 9523.; Wordsworth against Pettigrew, 15th May 1799, No. 69. p. 9524; Mackenzie's Obs. on 1621., c. 14.

The Court, (16th November 1804) were unanimous in dismissing the action.

Lord Ordinary, <i>Bannatyne</i> .	<i>Adv. Mackenzie</i> .	Agent, <i>Alex. Grant</i> , W. S.
<i>Alt. Monypenny</i> .	Agent, <i>Jo. Campbell</i> , 4tus, W. S.	Clerk, <i>Walker</i> .

F.

Fac. Coll. No. 181. p. 406.

B

ALL THE ABOVE

PACTUM PRIVATUM.

1586. July. L. KERBECHILL *against* LADY KERBECHILL.

No 1.

KERBECHILL, brother to Kerbechill, being lately deceased, pursued for exhibition and deliverance of the pupil, his brother's son. Compeared the mother, and *alleged*, She was tutrix testamentaria, and ought to have the bairn in her custody. It was *answered*, inierat secundas nuptias. She *answered*, That, in her constitution of tutrix testamentar, it was expressly provided, that, albeit she should happen to marry again, et sic provisio hominis abstulit provisionem legis. It was *answered*, That, upon the contrary, the provision of the law, that was founded and made for the weil and preservation of pupils and their gear, might not be taken away by any special provision of man, as appeared by the express law, and Doctors who write thereupon; Cod. Quando mulier tutelæ officio fungi potest; L. 2. et L. ult. ibid. Found by the Lords, that, notwithstanding of the said provision, the common law ought to be followed forth, and that her tutory testamentary (fell) per secundas nuptias.

Epl. Dic. v. 2. p. 24. Colvil, MS. p. 408.

1636. March 8. STUART *against* HENDERSON.

ONE William Stuart being served and retoured tutor lawful to the bairns of his umquhile brother, Mr Walter Stuart, notary in Perth, pursues Agnes Henderson, relict of his deceased brother, and , Stuart, now her husband, for exhibition of certain bonds, made to the bairns father, and being in her hands, as tutrix testamentar nominated in her umquhile husband's testament; and she compearing, and *alleging*, That the pursuer's retour to this office of tutory is null, seeing it was deduced before the Bailies of the Canon-

No 2.
Found in conformity with the above.

No 2.

gate ; whereas the defunct was indweller, and died in Perth ; and, consequently, he ought to have been served there, and not being done so, the same is null, as done *a non suo judice, et incompetente*. This exception was repelled ; for the LORDS found, that the brief of tutory being directed out of the Chancery, to any Judges generally, the party might serve the same before any Judge, even as a general brief to serve one general heir to his predecessor is sustained, being done before any ordinary Judge, having jurisdiction. And it being further *alleged*, That the defunct had nominated the defender, his relict, tutrix testamentar to the bairns foresaid, so that there was no place to the pursuer to pursue as tutor lawful, from the which office she cannot be thought to have fallen by her second marriage in respect that the said defunct, her husband, in his said testament, had nominated and appointed her to be still tutrix to the said bairns, during the whole time of their pupillarity, as well after her second marriage, as during the time of her widowhood ; and it being *replied*, That that provision ought not to be sustained, as being against the law, which provides, that no woman can remain tutrix after she has clothed herself with a second husband, whereby she becomes under her husband's government, and so cannot manage the office of governing another ; and this being the inviolable custom and practise of the realm, it cannot be inverted by any private appointment, set down in a testament against law and practise ; in respect of which reply, which the LORDS sustained, the LORDS repelled the said exception ; and, notwithstanding of the provision foresaid of the testament, found the relict had tint her office by her second marriage.—*See TUTOR AND PUPIL.*

Fol. Dic. v. 2. p. 24. Durie, p. 801.

1743. July 7.

THOMAS FULLARTON of Gallery, &c. Heritors of the Fishings on the Water of Northesk, Pursuers, *against* HERCULES SCOT of Brotherton, Possessor of the Cruive-Fishing on the said Water, Defender.

No 3.

A paction betwixt private parties, to dispense with the statutory regulations of cruives, is invalid, though acquiesced in for upwards of 40 years.

THESE pursuers brought an action against the defender, for keeping his cruives on the said water, in every article contrary to law, not only with regard to the wideness of the hecks, neglect of the Saturday's slop, and of taking salmon in forbidden time ; but also by raising the cruive-dykes to such a height above the water, that the fish could neither get up nor down.

Pleaded for the defender, That the pursuers were barred, *personali objectione*, from insisting in this action, their predecessors, or authors, having entered into contracts with his authors, whereby they consented, in consideration of an annual payment to be made by the heritors of the cruives, to allow them to

keep their cruives in the manner then and since accustomed; and, for verifying the defence, produced two different contracts, dated in the 1685 and 1687.

By which it likewise appeared, that the pursuers authors, or predecessors, had specially bound themselves not to pursue any action against the defender's predecessor, for regulating the cruives as to the wideness of the hecks, Saturday's sloop, &c.; and that the pursuers, &c. had ever since acquiesced in their agreements, and homologated the same, by receiving the annual payments.

Answered, The contracts were void and null, the purpose of them being none other than to authorise and encourage what the law has declared to be a transgression, and highly punishable, as appears from Parliament 1424, cap. 11. 1477, cap. 73. 1489, cap. 15. 1535, cap. 17. 1581, cap. 111. All which statutes not only enact very severe punishments for this delict, but require all Magistrates to see the same put to due execution. And the reason of so anxious an attention of the law to check such delinquencies is the same, viz. that they are not only prejudicial to the private interest of heritors, who have the right of salmon-fishing upon rivers; but also, that they are highly detrimental to the public, and plainly tend to destroy the very species of salmon, by hindering them to get up the water to spawn, and so preventing their multiplying in the ordinary way; 2dly, If such contracts could be supposed to have any effect against the parties who entered into them, they surely could have none against singular successors, which was the case of some of the pursuers.

Replied, Though the maxim *pactis privatorum, &c.* holds true in some instances, yet there are many more examples of the contrary, agreeable to the rule, *licet unicuique juri, &c.*; but in order to give both these rules their full effect, it is necessary to distinguish betwixt such regulations as the law introduced, that are truly necessary for preserving the fishing in general, and such as are no otherwise necessary than to limit the use of cruives in favour of superior heritors. The defender acknowledges, that regulations of the former sort cannot be renounced by paction, but such as are of the latter sort, and are only useful to maintain the private interest of the superior heritors, must be binding.

Now, to apply this distinction to the case in hand: The defender admits, all the laws relating to the time of fishing are perpetual and indispensable; and, in fact, his cruives are always taken down in forbidden time. The old statute, with respect to the mid-stream, was found to be in desuetude; 26th January 1665, Heritors of Don, *voce* SALMON FISHING. Neither is the Saturday's sloop essential to the subsistence of the fishing, as experience has proved. The acts that require three or five inches plainly mistake, as two inches are found sufficient to permit the fry to go up and down the water freely. In a word, the unnecessary wideness of the hecks, and Saturday's sloop, or the mid-stream, are quite unnecessary for the fishing in general, and can have no other use than to restrain the exercise of the cruives, in favour, or for the private

No 3. advantage of the superior heritors, which they could dispense with ; and which, if they were strictly put in execution, would, in a great measure, destroy that valuable branch of our commerce.

Duplied, The regulation of cruives are *publici juris*, and cannot be dispensed with ; the transgression of the statutes are declared to be crimes, and severely punishable ; consequently, pactions dispensing therewith cannot bind the consentor, much less his heirs or singular successors ; neither can such transgression operate a prescriptive right in favour of the transgressor.

The pursuers can discover no foundation for averring, that any of these regulations have gone into disuse ; on the contrary, the Legislature, while we continued a separate kingdom, enjoined the vigorous execution thereof from time to time ; neither has any of our Lawyers insinuated that they could go into disuse. See statute of Robert I. cap. 12. act 74th ; James III. act 68th, Parliament 9th ; Q. Mary, act 8th, Parliament 1617, art. 9th, act 38th, Parliament 1661 ; and a case in the 1737, between the Duke of Gordon and Lord Braco. See SALMON FISHING.

THE LORDS repelled the defence founded on the contracts produced, and sustained the pursuer's title to insist in this action.

Fol. Dic. v. 4. p. 37. C. Home, No 244. p. 394.

See APPENDIX.

P A P I S T.

1707. *July 22.*

The MARQUIS of ANNANDALE *against* The DUKE of QUEENSBERRY.

A DECLARATOR and reduction of the Duke of Queensberry's gift and commission from the Queen to the jurisdiction of the stewarty of Kirkcudbright, during the Earl of Nithsdale's incapacity. The case was, the Earls of Nithsdale are heritable Stewarts of that stewartry; but he being a professed papist, is by many of our acts of Parliament disabled from using and exercising that jurisdiction; whereupon he disposed the right of it to the Duke of Queensberry in 1698, upon a back-bond, who enjoyed it, till of late he reponed the Earl, and re-disposed it, with a procuratory of resignation, which Nithsdale assigned to the Marquis of Annandale, and he makes resignation of it in the Exchequer, and obtains a past signature, and when he is going to expedite his charter under the Great Seal, it is borrowed up and abstracted for some weeks, in April last; whereupon the Marquis takes instruments, and protests that the stop may not prejudice his right and diligence; and in this interval, a gift comes down, passed under her Majesty's hand, of the said stewartry, in favour of the Duke of Queensberry, as devolved to her through Nithsdale's legal incapacity of being a professed papist; and which gift is passed and expedite, and the Duke infeft thereon, and put in possession of the jurisdiction, by holding of Courts, chusing of members, &c. against all which, the Marquis having protested, he raised a declarator, that his right was preferable, though stopped, because he had used all the remedies law provides against such partial qualifications; and likewise repeated his reduction against the Duke's gift, *imo*, That though our law has been so jealous and cautious against the growth of popery, that it disallows any of that profession to exercise any heritable office, yet none of these laws hinder papists to sell or dispoise their lands and jurisdictions; and these acts of Parliament being penal, they are *strictissimi juris*, and so to be interpreted as not to be extended beyond their precise words; and they bear

No I.

Found, that a papist may dispoise his heritable jurisdictions, irredeemably, to a protestant.

- No 1. no clause restraining them to sell these offices ; and the Duke of Queensberry has understood it so himself, for he took a disposition of it from Nithsdale, and possessed nine years upon it ; and why might not the Marquis follow his example ? *quod quisque juris in alium statuerit, æquum est ut ipse eodem utatur.* 2do, The Marquis's right is prior *tempore*, and so *potior in jure* ; for his signature was past long before Queensberry obtained his, by subreption and obreption from the Queen ; and after his resignation was accepted and passed by the Exchequer, the Queen was so denuded, that she could not give a new right ; and although the Marquis's signature was stopped till Queensberry's came down, yet that can never prejudice him ; because, by the 66th act 1578, the Queen's compositors in Exchequer cannot deny confirmations or infestments to any of the subjects, the Queen being equally mother to them all, and they owing the same allegiance to her ; and if they give any partial preference or gratification, the protesting against them solves the party's right, and makes it be reputed in construction of law, as if it were actually passed and expedited the seals ; 3tio, Queensberry having denuded in favour of Nithsdale, with warrandice, that he neither had nor should do any fact or deed to the prejudice of that re-disposition, his taking a new gift from the Queen was a plain contravention of his warrandice. *Answered* for the Duke of Queensberry, That there was a great difference in our law betwixt the conveying and transmission of the rights of lands, and of heritable offices and jurisdictions ; and particularly in the case of the papists, it was the interest and security both of the religion and civil government, that not only they be disabled to exercise these jurisdictions, either by themselves or their deputies, but also that they may not convey or alienate them to confidants or trustees, though protestants, as appears by the act of Parliament 1693, for taking the oath of allegiance, and the act 1701, for preventing the growth of popery ; and if they be allowed to dispose these jurisdictions, it is just all one as if they named a deputy ; for the receiver will on the matter be but his deputy, and be wholly ruled and influenced by him. Likeas, by these acts, papists are declared incapable to purchase or acquire any such rights, and so the Duke of Queensberry's re-disposition of it to Nithsdale is null, and he could not transfer a *non ens* to Annandale. And it is plain all these heritable offices, during their continuing papists, return to the Crown, and are in the Queen's hands and disposal, only by her, and not by the Exchequer, no more than they can grant *novodamus*, and have never been disposed of by the papist himself, as appears by the jurisdictions belonging to the Duke of Gordon, and Earl of Panmuir, who, albeit a protestant, yet not having taken the oaths, the Queen disposes of his heritable jurisdictions. *Replied* for the Marquis, That law has made no distinction betwixt the transmission of papists' lands, which they are expressly permitted to sell, and their heritable jurisdictions, *et ubi lex non distinguit, nec nos distinguere debemus.* And he would gladly be resolved of two questions, *imo*, If Nithsdale might not have assigned Queensberry's back-bond to a protestant, and if he might

not have compelled him to denude? *2do*, If a creditor of Nithsdale's might not have adjudged this heritable office from him, as well as the rest of his estate? and if so, the rule of reciprocation is plain, that whatever is adjudgeable is disposable; and there is so far from any danger or inconveniency to the government, either in church or state, that papists be allowed to dispoise their offices, that it were to the benefit and advantage of this kingdom, that they were all of them totally denuded of these rights; and there is a vast difference betwixt this and their naming of deputies; for, in this last case, they are ambulatory, and a constituent can sit himself; but, by a total alienation, the radical right in the papist's person is extinguished and sopite.—THE LORDS having long argued on the state of the vote, and it being *urged* for Queensberry, That a papist may dispoise these jurisdictions without the Queen's consent; and it being *answered*, That the Queen had sufficiently consented, by her Lords of Treasury and Exchequer passing Lord Annandale's resignation, and that she is *signanter* and eminently present in her judicatories, and it is as legal as any subscription obtained from her personally by any of her Secretaries; therefore, the vote was stated, whether a professed papist may dispoise his heritable jurisdictions, irredeemably, to a protestant; or if the disposal of them accresces to the Queen? And the LORDS, by a plurality of eight against seven, found they might dispoise them, and so declared in Annandale's favour, and reduced the Duke of Queensberry's gift.

Fol. Dic. v. 2. p. 25. Fountainhall, v. 2. p. 384.

1710. July 21.

ROBERT JOHNSTON of Keltoun, and other CREDITORS of the deceased ALEXANDER MAXWELL of Tarraughtie, *against* JOHN MAXWELL, Eldest Son to the said ALEXANDER and JOHN MAXWELL of Breckenside.

In the competition for mails and duties of the lands of Tarraughtie, betwixt Alexander Maxwell's Creditors and John Maxwell his eldest son; the LORDS found an adjudication, led in the name of John Maxwell of Breckenside, a papist, upon a gratuitous bond granted by the said John Maxwell to him, null by the act 3d; Parliament 1700, for preventing the growth of popery; albeit the said adjudication was led for the behoof of the granter of the bond, who is a protestant. And it was *alleged* for him, That it was not the meaning of the statute to prejudice protestants, or to hinder them to employ papists as their trustees, except allenary in the education of youth, and the management of their affairs; whereas the granter of the bond was major, and so not to be supposed that he could be seduced by the influence or converse of his popish trustees.

Fol. Dic. v. 2. p. 25. Forbes, p. 432.

* * * Fountainhall reports this case :

No 2.

1710. *July 25.*—THE Creditors of Maxwell *contra* Graicy and Reid, in a competition for mails and duties. Graicy's right was, that John Maxwell, Tarraughtie's eldest son and apparent heir, grants a bond of 30,000 merks to Maxwell of Braickenside, his uncle, whereon he leads an adjudication, which is conveyed to Robert Graicy, and then to Mr Andrew Reid for John Maxwell's behoof. The other competitors were old Tarraughtie's creditors, and his second wife and her children, who founded on a bond of provision, whereon they were infest. After many objections on either side, at last Tarraughtie's creditors pitched on this, as the shortest way to bring their process to an end, that, by the 3d act 1700, it is statuted, that no adjudication, or other real diligence, be competent at the instance of a papist, or for his behoof, upon a gratuitous bond, or any other gratuitous deed whatsoever ; now, to subsume in the terms of this law, it is not denied that Braickenside is a professed and notour papist ; *2do*, That the bond is gratuitous, is as evident ; for, though it bears the onerous cause L. 20,000 in its narrative, yet being betwixt uncle and nephew, by the act 1621, it is not probative. Next, it is known, that Braickenside, all his lifetime, was never able to lend 1000 merks, much less 30,000 merks. *Answered*, If this bond and adjudication were to the behoof of Braickenside, the papist, then they acknowledge it would fall under the act of Parliament and be null, the design of that necessary law being to prevent papists from acquiring heritage, or having share in the property of the nation ; seeing, by other clauses in that act, papists cannot serve heir ; and though they be creditors for onerous causes, and adjudge for their debts, the legal can never expire, but only subsists for a security of their money ; but here it is confessed, that diligence by adjudication is not to the papist's behoof, but expressly to John Maxwell, a protestant, as his trustee ; and Braickenside has no benefit thereby, but only interposes, and lends his name for a protestant's behoof, which noways interferes with the design of the act of Parliament, which is not to prejudice protestants, but only to prevent papists having interest in property further than as creditors ; and no part of the act discharges the employing papists as trustees, the person for whose behoof it is being the only true proprietor. And though the foresaid law stop the expiring of an adjudication in the person of a papist, yet when conveyed to a protestant it expires within a year after ; and though all dispositions to cloysters and popish societies be null, yet they are not so null but they accresce to the next protestant relation ; even so here, though the adjudication be null in Braickenside's person, yet it may well enough subsist, being now transmitted to a protestant. *Replied*, That law will not so much as allow a papist to be employed in such trusts, for the law is not in copulative terms, but conceived disjunctively, if the adjudication be either led by a papist, or by a protestant for his behoof ; so it is enough to say it is led

at his instance, though, as to the alternative, it be not to his own behoof. And when can a Scots protestant be straitened? Can he not find trustees without pitching on a papist? Besides, a posterior clause of the act clears up this doubt; for it discharges papists from being chaplains, schoolmasters, governors, pedagogues, tutors, chamberlains, or factors; and if incapacitated from any trust or management of affairs, then *a fortiori* this disability will reach trusts.—THE LORDS, resolving not to loose a pin of that act, found the adjudication null, though it had been originally for a protestant's behoof; and much more when it is only conveyed to him since.

If the papist's call this persecution, let them remember it comes not up to the hundredth part of their unmerciful sanguinary laws; and that experience had made this act necessary, for securing the government both civil and ecclesiastic against their vigilant and unwearied attempts.

Fountainball, v. 2. p. 592.

1725. January 22.

JOHN MURRAY of Conheath against JOHN NEILSON of Chaple.

JOHN MURRAY, as protestant heir, pursued a reduction of a disposition of certain lands granted to Mr Nielson's author by William Macartney, who had succeeded thereto when he was papist, and founded his action upon the 3d act of the Parliament 1700, For preventing the growth of popery. In this cause the LORDS found, 'That the defender Mr Nielson, though an onerous purchaser, could be in no better case than Macartney the alleged papist, from whom his right by progress was derived.' But it being controverted, whether Macartney, though of popish parents, had been popishly educated, in regard, as was *alleged*, he had been put to learn at protestant schools, and was taught to repeat our catechisms, and attended the church, &c; the Lords allowed an act before answer, as to the nature and manner of his education, and behaviour during his life; and, upon advising the proof, 'They found it proven that he was popishly educated, and found no evidence that he took the formula, in terms of the act of Parliament.'

There were other two defences in point of law, *1mo*, That no question could be now made as to Macartney's being popish, since the same was never moved during his life, because the defender was now deprived of the most certain mean of saving his right, and exculpating his author of popery, by getting him to take the formula; *2do*, That, by a British act, *3tio Georgii*, entituled, An act for explaining an act in a former session of Parliament, entituled, An act to oblige papists to register their names, &c. and for securing purchases made by protestants; it is enacted, for explaining King William's act for the farther preventing the growth of popery, 'That no sale for a full and valuable

No 3.

In a reduction of a disposition of lands made by a papist, it was found, that the defender, tho' an onerous purchaser, could be in no better condition than the papist his author; and the Court repelled the following defences, *1mo*, That the papist being now dead, if the objection had been moved during his life, he might have cleared himself by taking the formula; and, *2do*, That, by an act of Parliament, it was declared, That no sale for a full and valuable consideration

No 3.
of a real estate, by any person or owner, to any protestant purchaser, shall be avoided, by reason of disabilities or incapacities.

consideration of a real estate, by any person or owner, to any protestant purchaser, for the benefit of a protestant, shall be avoided, by reason of any of the disabilities or incapacities in the said acts incurred, or supposed to be incurred by the seller, unless before such sale the person entitled to take advantage of the incapacity, shall have recovered the lands themselves, or given notice of his claim to the purchaser, &c. And though this statute was directed upon doubts that had arisen upon an English act of Parliament, yet the statutory part was general, and being enacted by the legislature of Great Britain, it ought to affect and explain the Scots statute, which was of the same tenor with that of King William in England, for preventing the growth of popery.

It was *answered* to the 1st, That as Macartney lived till he was after fifteen years of age, and omitted to purge himself by taking the formula, it was sufficient, by the act of Parliament, to annul and void his title, or any right derived from him; and therefore it was pleadable at any time.

To the 2d, That the British act relates entirely to the English act of King William, and therefore cannot extend to Scotland.

THE LORDS repelled the defence, that a question was not moved, of Macartney's being a papist and not having taken the *formula* during his life; and repelled the defence upon the act of Parliament *tertio Georgii* in favours of protestant purchasers.

Act. Ch. Binning & Ja. Fergusson.

Alt. Ch. Areskine.

Clerk, Murray.

Fol. Dic. v. 4. p. 37. Edgar, p. 151.

1739: February 14.

SIDNEY *against* BAILLIE, and other Creditors of MAXWELL.

No 4.

THE LORDS repelled the objection made in a ranking on the act 1695 to an adjudication, that it proceeded on bills and promissory notes granted by the common debtor, who was a professed papist, and that the onerosity was not instructed in terms of the said statute; in respect the act of Parliament only respected dispositions or direct conveyances.

Fol. Dic. v. 4. p. 37. *Kilkerran*, (PAPIST.) No 1. p. 365.

* * * C. Home reports this case :

SIDNEY having right to a bill and three promissory notes granted in England, by Sir George Maxwell of Orchardtown, to Morison of Prestongrange, upon which adjudication had been led against the estate of Orchardtown, after Sir George's death, brought a process of mails and duties, in order to obtain pos-

session. Against which it was *objected*, That Sir George being popish, the granting the deeds was in prejudice of his protestant heir, as tending to carry off the estate from him, contrary to the above act of Parliament; and, although they bear value received, yet, by that law, they are held gratuitous, unless the granter declare the same were for value.

Answered; The Scots act cannot regulate deeds done in England; *2do*, It only concerns gratuitous deeds, or dispositions in prejudice of their apparent heirs, and the benefit they may have by succession to the said popish persons; but neither the words, nor intention thereof, interdict papists from trade or commerce, or from borrowing of money, and contracting debt.

Replied to the 1st; *Quoad* the solemnities of writs, the *locus contractus* is the rule; and, if the usual solemnities of the place where the deed is executed be adhibited, it will be probative *ex comitate* every where; upon which foundation it is, that promissory notes, granted in England, are probative here; but, with respect to the quality of the person, his capacity to dispose of his real estate, the laws of the country where it is situated are the only rule, wherever the party himself may happen to sojourn or reside; there is no place for what the Doctors call *comitas in statutis personalibus*, especially where such laws are prohibitory; surely it would be absurd to suppose a Scots papist could get free of the act by going abroad; and what the defenders now plead for is supported by analogy; thus, an estate in Scotland cannot be disposed of on deathbed, although the deed should be executed in England or Holland, where no such law obtains.

In the next place, it was *objected*; That the adjudication is void, as being led for annualrents of the bill and promissory notes, bearing to be payable on demand, and no evidence, by protest or otherwise, that any demand was made in Sir George's lifetime.

Answered; Though there is no statute enacting, That promissory notes shall bear interest, yet, by the act 3tio et 4to *Annæ*, which extends the privilege of inland bills to promissory notes, it is declared, That, in any action thereon, the plaintiff shall recover his damage and costs of suit, in which damage is always included the interest of the value acknowledged to be received by the note, in the same way as in bonds for double of the sums received, wherein no interest is covenanted for; and, although the notes be payable on demand, there was no need to make any, as they bear value received; because it is the debtor's being possessed of the money, and the creditor's wanting the use of it, that gives rise to the damage.

Replied; By the foresaid act of Queen Anne, it is apparent that inland bills do not bear annualrent, unless protested within the time limited; therefore this bill, which was never protested, cannot bear annualrent, and much less can the promissory notes, which, at most, are but in the case of inland bills, bear any interest, since they never were protested; but it was unnecessary to enlarge on this head, seeing the Lords had the same question under their consideration this session, in the case of *Murrays contra Murrays*, where they

No 4. found, that an English promissory note, not protested, did not bear annual-rent.

THE LORDS repelled the objection of Sir George's being papist; and, as to the *pluris petitio*, they found, that the interest before the citation was not due, and therefore must be struck off.

Fol. Dic. v. 2. p. 25. C. Home, No 115. p. 184.

No 5.

What method to be taken by the protestant heir to follow out his claim.

1745. July 7. CHARLES GRANT *against* JOHN GRANT.

THE investitures of the estate of Carron being limited to heirs-male, and Colonel Grant of Carron having died without issue, John Grant, son to Peter Grant in Dell, was the nearest heir-male; but he being a professed papist, and a fellow in the College of Jesuits at St Omers, a declarator was brought by Charles Grant, concluding that he the pursuer is the next protestant heir, and that the said John Grant is a professed papist, at least habit and repute such, and therefore incapable to succeed to the estate of Carron. After the libel was executed, the pursuer applied to the Court, setting forth, that the witnesses to prove his propinquity were very old men, and therefore craving an examination to lie *in retentis*. Answers were made by the heir of line, who had the papist's authority to keep possession of the estate, that the *inducia legales* not being run, no instructions were come from Mr Grant at St Omers, about the defence of the process. For this reason, the Lords refused the desire of the petition.

After the *inducia* were run, and the process called, the pursuer insisted to have a proof of his propinquity before the Ordinary. Certain objections were made, which, with the answers, were reported to the Court. It was *objected*, *imo*, That, by the act 1700, it is incumbent upon the first protestant heir, to prosecute his right within the space of two years after the irritancy is incurred, otherways the right devolves upon the next protestant heir, and that this action was not brought within two years after Colonel Grant's decease; *2do*, That this method which the pursuer has taken to declare his right, as protestant heir, is not competent, having no foundation in the act of Parliament 1700, the only method there prescribed being by service; *3tio*, That, as the act founded on is penal, irritating the defender's natural right to the estate of his predecessor, it allows him to purge himself of popery in the manner therein directed; but so it happens, from an alteration in our constitution, that it is impracticable for the defender, or any other in his circumstances, to comply with the act, so far as it directs that the *formula* shall be taken before the Privy Council, which is now abolished, or before the presbytery of the bounds where the party resides; and in that case his renunciation of popery is appointed to be reported by the presbytery to the clerk of the Privy Council within forty days; and, as this

cannot be done; no action can be maintained on the statute, to forfeit a person for not doing what is not in his power.

To the 1st, it was *answered*, in point of fact, That there was no delay, as the pursuer's father set on foot his claim immediately after the Colonel's death, by a declarator of his propinquity, the prosecution of which was staid by his death; 2dly, In point of law, That the delay of two years gives access to the second protestant heir to claim the succession, but is not an irritancy upon the first protestant heir to bar him from prosecuting his claim, though the second protestant heir do not appear.

To the 2d, That a service is necessary to complete the title of the protestant heir; but that this excludes not a previous declarator to remove all objections to the service. If a protestant be entitled to serve heir, by the incapacity of the popish heir, he must be entitled to bring a declarator of his right upon the principles of common law.

It was *answered* to the 3d, That it proceeds upon a misapprehension of the statute; the sense of which is, that, if a succession open to a papist after his age of 15, which is the present case, the right of succession shall devolve *ipso facto* to the next protestant heir, who is allowed to serve heir to the predecessor, and to possess until the popish heir thus excluded purge himself of popery. The pursuer is therefore entitled to serve, and to bring a declarator to that effect. It is the popish heir's business, if he would claim the estate, to purge himself of popery in the terms prescribed by the statute; and, in the meantime, the pursuer is entitled to hold the estate until the papist fulfil the law. And if alteration of circumstances, by the abolition of the Privy Council, should even have the effect to make it impracticable to purge himself of popery, in the terms prescribed by the statute, this cannot effect the pursuer's right. At the same time, the difficulty is affected. If Mr Grant return to his native country, he may take the *formula* before any presbytery where he chuses to reside, which will purge his incapacity. It will not affect his right, that the same cannot now be reported to the Privy Council, more than the neglect of reporting when the Privy Council subsisted.

THE LORDS, before answer, allowed a proof to be taken to lie *in retentis*, which was what the pursuer chiefly aimed at.

Rem. Dec. v. 2. No 69. p. 107.

1750. February 15. DUKE of GORDON against The CROWN.

GEORGE Duke of Gordon, who was infest *anno* 1684, upon a charter under the great seal, executed in the year 1712, a gratuitous bond for a great sum of money to his eldest son Alexander Marquis of Huntly, upon which the Marquis adjudged the family estate, took a charter of adjudication from the Crown, and

No 6.

A superior who was a papist was infest on adjudication against his predecessor.

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sors estate. He had infeft his vassal, who was attainted. The superior's heir being infeft on a service to his remoter predecessor neglecting the adjudication, was found to have the benefit granted by the clan act.

When a papist is served and infeft, what is the nature of his right?

was infeft *anno* 1712. Alexander the Marquis, afterwards Duke of Gordon, having died in the year 1729, his son Cosmo-George, made up titles to the estate, by a special service as heir to George Duke of Gordon his grandfather, neglecting the title that was in his father Duke Alexander; and he was infeft in the year 1731.

Sir Evan Cameron was infeft *anno* 1688, in the twenty merk-land of Mamore, held feu of the Duke of Gordon. Sir Evan disposed the said land to Donald Cameron his grandson, with procuratory and precept; who, in the year 1724, obtained from Alexander Duke of Gordon a charter of resignation, upon which he was infeft.

Donald Cameron being attainted of high treason for joining in the rebellion 1745, the present Duke of Gordon, as superior of the land of Mamore, claimed the same upon the clan act.

The objection made against this claim in behalf of the Crown was, that the titles of the forfeiting person, and of the claimant, are inconsistent with each other; that if the superiority was in Duke Alexander, which must be supposed to validate Donald Cameron's infeftment as vassal, the present Duke can have no claim to the superiority, not having served to his father but to his grandfather; that, on the other hand, supposing the claimant to be regularly infeft in the superiority, Duke Alexander's right was null and void; and consequently the charter granted by him to Donald Cameron was *a non habente potestatem*.

Answered, 1mo, Supposing the inconsistency, and that either Lochiel must be considered as heir-apparent in the property, or the claimant heir-apparent in the superiority, the claim is, notwithstanding, good upon the clan-act. For, *1mo*, The benefits given by this act, being intended as an encouragement for loyalty, must take place with regard to heirs-apparent, as well as with regard to those who are infeft. In this statute, the Highland chieftains were principally in view, who have the same power over their clan infeft or not infeft. *2do*, In law language, and in all our acts of Parliament, the terms *superior* and *vassal* are applicable to heirs-apparent, as well as to those who are entered. A lord may demand subsidy from his vassal for making his eldest son a knight, and for marrying his daughter, *Stat. 2. Rob. I. cap. 18*. The King cannot interpose any other superior betwixt him and his vassal. *Stat. Rob. III. cap. 4*. Here, by vassal, is meant one not infeft, as well as one infeft. By act 57, Parl. 1474, the over-lord, or superior, not entering to the superiority in order to infeft his vassal, shall tine the superiority for life. Here the heir-apparent in the superiority has the name of over-lord, and the heir-apparent in the property, the name of vassal. *3tio*, The treasons in that statute are evidently applicable to heirs-apparent, and therefore the benefits, which are commensurate with the treasons, must also be applicable. *4to*, Where the superiority is forfeited to the Crown by the forfeiture of the superior infeft, it seems undoubted, that the heir-apparent in the property, is intitled to demand a charter from the Crown in terms of

the clan-act, and the privilege must be reciprocal; and if it be competent to the heir-apparent of the vassal, it must also be competent to the heir-apparent of the superior.

Answered, 2do, The claimant's infeftment as superior, is perfectly consistent with Lochiel's infeftment as vassal; and to make out this, it shall *first* be shiown, that Lochiel was regularly infeft in the property; and *next*, that the claimant stands regularly infeft in the superiority; to which ends, it will be necessary to give the analysis of the Popish act 1700.

By this statute it is enacted, That if a succession devolve to a papist, "his right and interest in or by the foresaid succession, shall become void and null, and shall devolve and belong to the next Protestant heir." To clear the meaning of this clause, we shall suppose Duke Alexander had been served heir to his father, and been regularly infeft. And the question is, Whether this feudal title to the estate was intrinsically null and void, so as to put the Duke upon no better footing than an heir-apparent? *Answered*; Such infeftment is not declared to be null and void to all intents and purposes, but only as to the right and interest of the Protestant heir. And, that it is not intrinsically void and null, will be evident from the following considerations; *1mo*, Upon that supposition, it would not be competent to the Popish heir to pursue a declarator of non-entry; *2do*, If the Papist does thereafter purge himself of popery, his prior infeftment is good to all intents and purposes; And, *3tio*, His creditors by this very statute are declared to be secure, if their debts be contracted before their debtor is excluded from the estate by the protestant heir. They are considered as debts contracted by a proprietor infeft, and execution will be competent upon them accordingly.

But, though such infeftment is not *ipso facto* null and void, yet it is declared to be null and void with regard to the heir's own right and interest in the estate, in order to make way for the protestant heir: It is null *quoad* the papist himself, so as to bar him from taking any benefit by the succession. Therefore, it is not a good title in a declarator of property, nor in a removing; nor in mails and duties, nor in any real action that is for behoof of the papist himself. It does not bar the protestant heir from serving to the remoter predecessor, it being declared his privilege to be so served without regard to the papist. But, there is nothing in the statute to hinder the infeftment of the popish heir to be a good passive title against him, so as to oblige him to pay his predecessor's debts, to infeft a purchaser who has bought land from the predecessor by a minute of sale; and, in general, to perform all deeds which an heir served can be compelled to by process. For this nullity was never intended to hurt third parties, his Majesty's protestant subjects, but only to bar the papist himself from enjoying the estate, or reaping any benefit by it. In short, such infeftment is a good passive title to subject the papist entered heir, in the same manner that a protestant would be subjected; but is not a good active title: It was not meant to relieve the papist from burdens, but only to exclude him from

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benefits. And this regulation is extremely rational : a popish heir, if he abstain altogether, which he ought to do by the law of the land, has no benefit, and will be subjected to no burden ; but if he will enter in contempt of the law, it is just that his entry should make him *passive* liable in the same manner that it makes other heirs ; and the entering vassals is one of those burdens to which he is subjected, and to perform which he can be compelled by a process.

The other point is to make out, that the claimant is regularly infeft as heir to his grandfather. And, to handle this point with the greater perspicuity, we shall first consider the case of a popish heir who is in possession by apparency, from whom the estate is claimed by the protestant heir. In this case the statute is express, that " it shall be lawful to the protestant heir to serve heir to the defunct, to whom the intervening papist might have succeeded." This service then of the protestant heir is a complete title to the estate, without necessity of any declarator, to enable him by a process of removing, or mails and duties, to turn the popish heir out of possession. And if the popish heir should pretend to defend himself upon his apparency as nearest heir, the answer would be sustained, that he is a papist. *2do*, The case would be the same, though there were a conveyance of the estate to the popish heir : The statute makes no difference betwixt a title by conveyance and a title by apparency.

The only difficulty in this case is, that Duke Alexander was infeft as heir to his predecessor ; or, which comes to the same, was infeft upon an adjudication founded upon his predecessor's gratuitous bond ; and it may be thought that this infeftment could not be taken away otherways than by a declarator or reduction. But, in answer it may be observed, *imo*, That such an infeftment being taken *prohibente lege*, is null and void so far as founded upon to the prejudice of the protestant heir ; and therefore cannot require a rescissory action, or action of reduction, which supposes the right to be effectual in law till it be taken out of the way by a process. The statute deprives the popish heir of the privilege of possession as well as of property ; and therefore the objection of his being popish will not be reserved to a reduction, but is competent by way of exception : It is competent in this form to the tenants of the estate who are pursued in removings or for mails and duties, and *multo magis* to the protestant heir, as to whom the infeftment is not merely voidable, but void. And, if a conveyance upon which the popish heir is infeft requires not a reduction, which is plain from the statute, as little can an infeftment upon a service require a reduction. *2do*, As to a declarator, which is the proper action for making nullities effectual, and for ascertaining any right that may be disputed, it appears obvious from the nature of this action, that it is calculated merely for expediency, and can never be necessary *de jure* in any case : It is an action peculiar to this country, and is not known in England. We have no occasion to mention here declarators of escheat, of bastardy, of *ultimus hæres*, and such like, which are of a peculiar nature, and which *de praxi*, are necessary solempni-

ties to establish some sort of rights. The King may bring a removing against any man who is in possession of the annexed property; and the superior may bring a removing against his vassal who has incurred a conventional irritancy *ob non solutum canonem*; a declarator is indeed competent in both these cases, but is not necessary in either. An irritancy of entail, it is true, cannot well be made effectual but by a declarator; because the heir, who is entitled to lay hold of the irritancy, cannot bring an action of removing, or of mails and duties, without a service; and no inquest will readily serve him, until the irritancy be first declared; because private men will seldom undertake determining such intricate points. But a person's being a papist is not an intricate point, and no jury will decline to find so upon good evidence. A service thus obtained will be a good title in a removing to turn the popish heir out of possession; because the popish heir, who is declared to have no benefit by the succession, is not entitled to the privilege of possession more than of property. And in this particular, he is to be distinguished from an heir of entail committing an irritancy, and from a vassal committing an irritancy *ob non solutum canonem*, who are not thereby deprived of their right of possession.

But the claimant has no great occasion for the foregoing arguments. His case is different, being a service to his grandfather after his father's death. And, even supposing a decree of declarator to be a necessary step for turning his father out of possession, yet surely a declarator after his father's death cannot be necessary, nor even competent; because the claimant has no person to declare against, nor any person to sustain the part of defender. And Lord Stair, B. 4. Tit. 3. § 47. justly observes, "That declarators use not to be raised or insisted on where there is no competition or pretence of any other right," which is precisely the present case; and which is agreeable to the rules that govern this action, that it is not necessary in law, but only calculated for expediency, in order to ascertain the pursuer's right, when he foresees the same will be disputed.

To sum up the whole, the infestment of a popish heir is a singular sort of right. It subjects the heir entered to all the passive effects of a service, in the same manner as if he were a protestant; and particularly to the obligation which superiors are under to enter their vassals. But such infestment can afford the popish heir no active title; and particularly it is null and void as to the protestant heir served to the remoter predecessor; which being considered, there can remain no doubt that the protestant heir may serve to the remoter predecessor, if the popish heir be dead.

The President was clear upon both points; *imo*, That heirs-apparent have the benefit of the clan-act; *2do*, That the claimant was habily vested in his estate by his service to his grandfather. All the Judges were of the same opinion, except the Justice Clerk and Elchies, who did not vote. But the two points were not voted separately. The question was put in general, Sustain the claimant's title, or not? and it was carried, Sustain.

Fol. Dic. v. 4. p. 38. Rem. Dec. v. 2. No 114. p. 229.

No 6.

*** D. Falconer reports this case :

GEORGE Duke of Gordon was infeft under the great seal, in the Marquisate of Huntly, comprehending the Lordship of Lochaber, 1684 ; and granted the lands of Mamore, part of the said lordship, to Sir Evan Cameron of Lochiel ; who was infeft therein 1688, and dispoſed them to Donald Cameron his grand-son, who was infeft thereupon base 1716.

The Duke granted two bonds for L. 50,000 and L. 10,000 Sterling, to Alexander his eldest son, who adjudged, and was infeft 1712 ; and granted to Donald Cameron a charter, upon the resignation in his grandfather's diſpoſition, and confirmation of his infeftment 1724.

On the death of Alexander Duke of Gordon, Cosmo-George his son, served himself heir to his grandfather, and was infeft 1731, neglecting the title by adjudication, which had been established in the person of his father.

Donald Cameron was attainted for high treason by act of Parliament, 19. Geo. II. and thereupon the Duke of Gordon entered his claim for these lands, as recognosced to him the Superior thereof, in virtue of the provision in the statute made for that purpose.

Answered by the King's Advocate ; The claim ought to be repelled, for that the claimant and forfeiting person, were not superior and vassal : The Duke was heir to his grandfather, who granted the feu-right to Sir Evan Cameron, which was diſpoſed to Donald ; but neither the granter nor his heir had accepted of the resignation in that diſpoſition, nor confirmed the sasine proceeding thereon ; and Donald Cameron had only been received as vassal by the adjudger from Duke George ; to which adjudication no title had been made up : The adjudication was either a good title to the superiority ; and then Duke Cosmo had no title thereto, as heir to his grandfather, from whom it was carried away ; or it was not ; and then Donald Cameron was not the vassal, being infeft by a wrong superior.

Replied ; It is not necessary to intitle a claimant to the benefit of this act, that compleat titles by investiture have been made up, in the person of both superior and vassal : What the law considered, was the influence which superiority gives ; and this is not destroyed by the lying out of either unentered ; and, indeed this strict interpretation would very much restrain the act, and make it ineffectual for the purposes for which it was intended. The term of superior, or over-lord, is not confined to the case where rights are completed on both sides, either in common or law language, as appears by the act of Ja. III. P. 7. c. 57. which provides a remedy whereby the vassal may be infeft, when the superior lies out unentered : The act indeed was new, but there are other cases of forfeitures accruing to superiors, according to the analogy of which it ought to be explained ; as in England within a county palatine, as the bishopric of Durham, forfeitures for treason belong to the count ; and generally for.

felony to the superior; likewise, for all crimes, the forfeiture of a copy-hold to the lord of the manor; and in Scotland, liferent escheat falls to the superior: The restrained interpretation is in this case pleaded for the Crown; but in many it would carry away from it a forfeiture, and give it to a person who really has no interest, and comes not within the intention of the law; as suppose a purchaser infest base, who holds of the disponent, and yet the disponent has no equitable title to the superiority, which the other can complete his title to when he pleases: If such person should forfeit, his Majesty's advocate would scarce suffer the disponent to carry off the subject. *Lastly*, The act determines the question; it creates a new treason, capable to be committed only by persons having lands, to wit, adhering to the pretender within the kingdom; and as the clauses giving the encouragements, are of the same latitude with this determining the treason, on occasion of the commission of which these encouragements are given, the term of holding lands used in these clauses, must be understood in the same sense with that of having; which may be verified of many who have no complete investiture: And so in many cases, after the rebellion in 1715, the benefit of this act was actually enjoyed without complete titles.

Duplied; This statute, which introduced a novelty into the law, is to be understood by considering the clauses and import of it, and not explained by any fancied rules of analogy. It enacts, "That lands held of any subject superior, should recognise, and be consolidate with the superiority, as if they had been resigned in *perpetuam remanentiam*." Lands cannot be said to be held of one man by another, unless they are both properly infest; nor can they otherwise effectually be resigned, in similitude of which this consolidation operates. The instances of the expressions cited from the law by the claimant himself, shew that it is accurately penned, and the words to be understood in their proper signification; as it uses holding where it is granting the encouragements to superiors and vassals, who are such only by holding the one off the other; and yet makes adhering to the pretender treason in all having lands; as it is intended this sanction should not be restricted to persons infest.

Observed; The term of having lands ought to be only understood of persons infest as well as holding; considering this is a penal clause introducing a new treason, and therefore to be strictly interpreted; as, when by our law, theft in landed men was treason, it would have been necessary to bring a man into these circumstances, that he should have been infest: That this was necessary to bring a man under the description of this law, may be inferred from another clause thereof, liberating the heir of a man killed in the King's service from the casualty of marriage;—for as one marriage can only be due for one entry, though more heirs have died in the state of apparency; it were unjust that the superior should be deprived of a casualty, that had already accrued to him, by the existence of one apparent heir who died, because another was killed in the service.

No 6.

Observed in answer ; There was no new treason introduced by this act, which was made in the view of a rebellion, in favour of the Pretender, and by adhering to him, means adhering in that war, or rebellion to be raised, or the like, which was treason formerly ; and so there is no need of restraining the signification of the words in one clause, for fear of not being at liberty else to restrain them in another, which is penal. It is true that but one marriage can be due upon one entry ; but here the superior is not deprived of any casualty accrued, for the heir being dead without entering, the law substitutes the marriage of the next apparent heir, in place of his.

Replied ; 2dly, Here both superior and vassal were validly infeft, and stood in the full relation to each other : Alexander Duke of Gordon was popish, and for that reason could make up no effectual title to his predecessor's estate : Suppose him to have been served, the service was null, in so far as the protestant heir's interest was concerned, who could have served notwithstanding thereof, and needed not, by the statute 3. S. 9. K. W. any reduction or declarator to have set it aside ; much less was there any such need, when the service was not expedite till the decease of the popish heir ; for as Stair says, b. 4. tit. 3. § 47. " Declarators used not to be raised or insisted in, where there is no competition or pretence of any other right." The case is the same with regard to the Duke's adjudication on his father's gratuitous bond, which was null, and did not carry the estate into the person of him a papist ; and thus Duke Cosmo, neglecting this null infeftment, was properly served to his grandfather ; whereupon he was validly infeft in the superiority. On the other hand, the title made up in the person of a papist, is not null to all intents ; the fee is thereby full, so that the superior could not pursue a declarator of non-entry, it being only null, in so far as the protestant heir's interest is concerned : The interest of the papist's creditors, so long as he continues to possess, is expressly saved by the act, and he may even make valid his title by renouncing popery : The service, in the mean time, is effectual against him, and he is thereby subject to his predecessor's obligations ; consequently bound to enter vassals, whose entry must be effectual to them, as the rights of the creditors of a papist in possession are saved ; and as they could not obtain their entry from any else than the person vested in the superiority, on a title which is good to all intents, except in competition with that of the protestant heir : Thus, Lochiel was effectually seized in the property of his estate, and became vassal to the claimant, on his making up a title to the superiority.

Duplied ; The titles of one or other of the parties must be bad ; they cannot both be sustained, as being inconsistent with each other. If the Duke's adjudication, as led by a papist, was null, then the infeftment under it was null also, it being only the rights of creditors of popish heirs that are saved, not their deeds in favour of their vassals : But this adjudication was led against the grantor of the bond when alive, and was not an expedient for making up a title to a defunct's estate ; and as the legal of adjudications led by a papist, are declared

not to expire, it resolved into a security for the sums in the bonds; and so was no sufficient title to the adjudger, to enter vassals. It is true that these legals expire in one year after the right comes into the person of a protestant; and this adjudication may be said to have come into the person of Duke Cosmo, who was apparent heir to his father the leader; but, then the diligence carried the estate; and he could take nothing by his service to his grandfather, consequently is not yet validly infeft.

Observed; That without having recourse to the act for preventing the growth of popery, the titles were complete on both sides: When the right of an incumbrance upon an estate, comes into the person of one that can make up the proper title, he may make up his title, and neglect the incumbrance, which flies off; though he will be obliged to acknowledge the rights of third parties under that incumbrance.

THE LORDS sustained the claim.

Act. *R. Craigie, Ferguson, & H. Home.*
Clerk, *Kirkpatrick.*

Alt. *The King's Council, A. Macdowal, & A Pringle.*

D. Fac. v. 2. No. 130. p. 146.

1758. December 13.

LUNDIN of that ilk, *against* The KING'S ADVOCATE.

JAMES LUNDIN of that ilk claimed the estate of Perth, surveyed as forfeited by the attainder of John Drummond, brother and apparent heir to James Drummond of Perth, for that the said John Drummond being a papist, was by act 3. ses. 9. Parl. King William, rendered incapable to succeed as heir to any person whatever; and the claimant was protestant heir to the said James Drummond in the said estate, which had been granted by charter under the Great Seal, 17th November 1687, to James Earl of Perth in liferent, and to James Lord Drummond his son in fee, and the heirs-male of his body; whom failing, to his other heirs-male; and disposed by the Lord Drummond, 28th August 1713, to James his son, and the heirs-male of his body; whom failing, to his other heirs-male whatsoever; upon which title, it was found by the Court of Session, and affirmed by the House of Peers, that the estate belonged to the late James, and was not forfeited by the attainder, which the Lord Drummond afterwards incurred on account of the rebellion in 1715. The claimant being grandson to John Drummond Earl of Melfort, brother to the Earl of Perth, was nearest male heir professing the protestant religion to James Drummond, who died last vest and seised in the estate of Perth; notwithstanding that the Earl of Melfort stood attainted of high treason, by judgment of the Parliament of Scotland, 2d July 1695; for that it had been resolved by the Parliament, pending that process, that no doom to be pronounced therein.

No 7.

An irritancy not declared before forfeiture is not proportionable to evict the claim of the protestant heir not anteriorly insisted in.

No 7.

should corrupt the blood of the children procreate betwixt him and Sophia Lundin, heiress of Lundin the claimant's grandmother.

Answered; The estate was claimed by Drummond of Logiealmond, whose claim was dismissed 17th December; but this claimant did not think proper to appear in that cause for his interest, though the sustaining of Logie's claim would have been exclusive of his; it was also competent to him, supposing him protestant heir, to have taken the estate from James Drummond who was also papist, and possessed it long; instead of which he suffered him to continue his possession, and only now makes his claim when it is already forfeited. The act of Parliament does not directly take the right out of the popish heir, and vest it in the protestant, but it is necessary some legal step be taken for that purpose; it enacts, That if the protestant heir do not prosecute his right, by service or other legal mean, to affect the succession, within two years after the irritancy is incurred, there shall be access to the next protestant heir, to whom the like space is allowed; and if he fail, to the remoter heir, on the like conditions, ay and while the right be effectually established in a protestant heir, who, by owning and establishing his title, shall have right to the profits, after incurring the irritancy. The second protestant heir does not declare any irritancy against the first, but insist against the popish heir, who consequently is owned to have been in the right; in the mean time his onerous deeds are effectual, and he may recover the estate within ten years, by becoming protestant; and therefore, if all the protestant heirs lie off, till the papist, by committing treason, has incurred a forfeiture, it is then too late for them to claim the estate. The act was intended for the discouragement of popery; but if the claim is good, it will be the greatest encouragement to it; the papist shall possess by the indulgence of his protestant relation, and if he is forfeited, the estate only goes to his relation. The question was decided in 1719-20 by the House of Peers, who dismissed the exception of Assint against the survey of the estate of Seaforth, which he claimed as protestant heir; and the Lords of Session, 16th November last, disallowed the claim of Captain Gordon to the estate of Park, which he made upon an irritancy of a tailzie incurred, but not declared, before forfeiture. If John Drummond were alive, and free to compete with the claimant, it behoved to be shewn he was papist, and that cannot operate *ipso jure* to transfer a right, which must necessarily be the subject of a proof; neither can it be made appear, now after his death, whether he was papist or not, since it cannot be known whether he would have purged himself of popery, to have enabled him to hold the estate.

Replied; The estate could not be forfeited by the attainder of John Drummond; as, by act of Parliament, he stands attainted from the 18th of April 1746, and the succession only opened on the 11th of May that year; but, on this topic, it may be sufficient to refer to Logie's case; neither can it be held as escheat, which arises from the defect of an heir, whereas not John Drummond, but the claimant was entitled to succeed. It would have been improper

for the claimant to have appeared, and pleaded his title in the process upon Logie's claim, as if that disposition had been sustained, it would have been exclusive of any heir; but then it would have been competent to him to have insisted, as protestant heir, to the uses for which that disposition was in trust*. If he did not insist to take the estate from James Drummond, he can truly say he was ignorant of his right, imagining his own blood was corrupted, by the attainder of his grandfather, till he lately discovered the saving in his favour; neither does he apprehend that he could have taken the estate from him, as he possessed by disposition, the right of which did not go to his heir; and though, by the act, the protestant heir has right to an estate, to which a papist succeeds, or possesses by disposition from his predecessor to whom he might have succeeded; yet, as Lord Drummond was attainted before his death, his son James never could have succeeded to him, and Lundin never could have served to him, which was the only way for him to have come at the estate; but supposing he did suffer him to possess, this does not exclude him from claiming as his heir; the protestant heir's right does not require any declarator of irritancy, but the papist is declared incapable to succeed, and the protestant needs only to serve, and if both were seeking to serve, would be preferred; this would have been the case, if the claimant were competing with John Drummond, which might have been if he had surrendered in terms of the act; and Lundin cannot be blamed that he did not insist in that form before the attainder was fixed by his contumacy, since, in the mean time, the estate was by statute vested in the King, and he could only afterwards proceed by claim. Captain Gordon claimed on an irritancy, which could only be made effectual by being declared; and there was no decision of the present question in Assint's case, who presented his exception as protestant heir to the Countess of Seaforth; but it being found she was only a trustee for the family, he replied he was protestant heir to the use of the trust; this the LORDS sustained. It appears by the cases, that the whole question was argued before the House of Peers, who reversed the judgment; but the ground of their sentence does not appear; and the judgment was well reversed on this ground, that there was no exception timeously presented as protestant heir to the family of Seaforth, for whom the Countess was trustee.

Observed; The judgment was reversed upon the question now before the Court; and would have been ill reversed upon any other ground, for the excepter being heir to the Countess, carried the estate; and being heir in the uses, the trust was for his own use; so the reply was rightly sustained.

Answered; 2dly, Lundin cannot claim as heir; he connects his relation through the Lord Drummond, father to the last in the fee, who was attainted; and so the bridge was broken down, as it is expressed by Hales, H. P. C. vol. 1. c. 18.

* The disposition, failing the heir of the disposer's uncle and sister, was in trust for the use of Logie himself, so Lundin was not protestant heir to the uses of that deed.

No 7.

Replied ; This obtains, as is declared in the same chapter, in fees-simple, but not in fees-tail ; for there the blood is entailed, and therefore if a son commit treason, and die before his father, the grandson shall have the fee-tail, 3. Coke's Reports, Dowtie's case, 10. B. This estate being destined to heirs-male, is an estate in tail-male ; and by the authority cited, goes to the heirs in tail, notwithstanding the corruption of blood.

Duplied ; A destination to heirs-male makes with us a fee-simple, the estate being entirely at the disposal of the fiars, and not like an estate tail, which is unalienable except by the device of fine and recovery ; and that estates pass, notwithstanding of corruption of blood, is entirely a consequence drawn by the lawyers from their being unalienable.

Triplied ; This destination ought to carry the estate, notwithstanding the Lord Drummond's attainder ; it does not import that it was forfeitable ; for, by the case in the authority, that estate might have been forfeited, and would have been escheat if the son had lived ; but it went to the grandson, for this reason, that he was not called by the law in virtue of his relation, but by the donor ; and, though the legal relation was cut off, was sufficiently pointed out by the description of the natural relation which subsisted.

THE LORDS found that James Lundin, the claimant, could not be served heir-male to James Drummond deceased, the person who stood last infest, in respect that he behoved to connect his title through the person of James Drummond, formerly Lord Drummond, whose blood was corrupted by the attainder ; and further found, that the said James Lundin not having claimed as protestant heir before the estate was forfeited by the attainder of John Drummond, commonly called Lord Drummond, he could not over-reach the forfeiture, and draw back the estate from the Crown, on pretence of his being the nearest protestant heir. See FORFEITURE.

Act. R. Craigie, et alii.

Alt. The King's Counsel.

Clerk, Gibson.

D. Falconer, v. 2. No 171. p. 204.

No 8.

1755. July 2.

MARY COLLINS and Her TRUSTEES, against Lord BOYD.

A lady who
professed her-
self a nun,
was found not
to have for-
feited her
right to claim
her share of a
personal bond
in favour of
the children
of a marriage.]

WILLIAM Earl of Kilmarnock, grandfather to the defender, by his bond dated in the 1714, proceeding upon the narrative of love and favour, obliged himself
 ' to pay to his uncle Captain Charles Boyd, and Katharine Van Reest his
 ' spouse, and longest liver of them, the ordinary annual rent of 6000 merks,
 ' and to the children procreated or to be procreated between the said Captain
 ' Charles Boyd and his spouse, the principal sum of 6000 merks, at the first term
 ' after the death of the longest liver of the said Charles and his spouse, *proviso*,
 ' That if there should be no children surviving at the same term of payment,

‘ then the bond, in so far as conceived in favours of children, to be void and null.’

Captain Charles Boyd survived his wife, and died in the year 1736, leaving issue of the marriage a son and daughter, Malcom and Jean. Jean, during the life of her father, became a professed nun in the cloister of the penitent capuchines at Bergen St Veron in French Flanders. Malcolm intermarried with the pursuer Collins; and, by tripartite indenture made upon their marriage, he transferred the Earl of Kilmarnock’s bond, and the sum of 6000 merks, thereby secured to certain trustees for particular uses; and, *inter alia*, in trust, for paying over, after his death, the 6000 merks, as the same shall be received, to Mary Collins, in case she shall survive him.

Malcolm having died, his widow and the Trustees pursued Lord Boyd, who had become bound for his grandfather’s debts, for payment of the whole 6000 merks; *alleging*, That Jean Boyd, by her profession of a nun, and vows of poverty, chastity, and obedience, was incapable to take or hold any civil right; that she became *civiliter mortua*; and therefore the whole obligation for the 6000 merks, payable to the children of Charles Boyd and his wife, surviving their parents, vested in Malcolm as the only surviving child, in the same manner as if Jean had been naturally dead before her father; in which case, neither she nor her heirs would have had any right in this sum.

And, in support of this plea, it was further *contended* by the pursuers, That, by the very constitution of monachism, and by the vows of poverty taken by all professed monks and nuns, they neither could have property nor enjoy any civil right. This is the rule of the civil law, Authen. ingress. C. De sacrosan. eccles. assumed into the canon law, tit. De statu monachorum, C. 6.; and, in every question such as this, the Canon law was undoubtedly the law of Scotland before the Reformation. Craig expressly establishes, by his opinion, the doctrine here maintained, lib. 1. dieg. 13. § 20. ‘ Monachi enim nihil in bonis ratione suæ professionis habent, in feudum non concedunt.’ And again, dieg. 14. § 11. ‘ Monachus apud nos, cum non solum servo equiparetur, sed etiam mortuus mundo dicatur, neque novi feudi, neque paterni est capax.’ And in lib. 2. dieg. 18. § 14. he lays it down as an invariable rule, ‘ Monachum, qui seculo renunciaverit, ad successionem non admitti.’ And, though he speaks of feus, yet the reasons apply with as much force to the case of moveables; and do equally prove, that a professed monk or nun can enjoy property of no kind.

And though the law varies in different popish countries, in some the monk acquiring to the monastery, as, by the civil law, a slave acquired to his master; in others, the estate devolving to the heir *ab intestato*, as if the monk was naturally dead; yet the laws of all countries do agree in this, that the monk cannot enjoy. By the laws of England and France, the two great sources from which the law of Scotland is derived, profession as a monk was deemed equal to natural death, and place was given to the *ab intestato*. Coke upon Littleton, F.

No 8.

132. Pérez. in Cod. 1. 1. tit. 2. No 20, 21. This, there is all reason to believe, was also the law of Scotland before the Reformation; but supposing the other custom should be thought to have prevailed, and Jean Boyd considered as acquiring to the monastery, yet that will make no variation in the argument. Our law, since the Reformation, will not allow a foreign monastery to take any estate in Scotland, whether real or personal. A foreign monastery is undoubtedly an alien; it is no body, politic or corporate, to take in the right of any of its nuns; and, [more particularly, they are effectually barred by the act 1700 for preventing the growth of popery; which enacts, 'That all dispositions, &c. in favours of cloisters, or any other popish societies, or to any person for their behoof, shall be void and null, in so far as concerns the said cloisters or popish societies; but the same shall, *ipso facto*, fall and accresce to the nearest protestant relation to the giver, at the time when the said disposition, &c. was destined to be effectual.' If, therefore, Jean Boyd's interest in this bond must necessarily fall to the monastery, it is undoubtedly voided by this statute; and Malcolm, the nearest protestant heir, is vested in the right of her the giver; or, if Lord Kilmarnock should be thought to be the giver in the meaning of the statute, still this defender can have no right, as he is excluded by his father's attainder.

Jean Boyd being thus barred from having any interest in this bond, both by the common law and by statute, she being in the state of an alien, incapable to take, as well as the popish monastery, in right of her; Malcolm, and the pursuers in his right, are entitled to the whole sum. Had the grant been *nominatim* in favours of Jean, it must be held *pro non scripto*; but, as no part of it is payable to Jean *nominatim*, but the whole to the children of the marriage in general, any one child is entitled to take the whole sum in his own right, if no other child concurred with him, whether such want of concurrence happened by non-existence of other children, or by their being debarred by legal impediment.

Answered for the defender; Jean Boyd, from the day of her birth, was creditor to Lord Kilmarnock in a proportional part of the sum in question; and no forfeiture of this *jus crediti* can operate *ipso jure*, without a declarator, to which she herself must be made a party. Defences unknown to the defender may be competent to her. She may have objections to the validity of this supposed profession; may be released from her vows; may quit the monastery without being so released; may abjure popery; may embrace the protestant religion; and, by all these means, be re-instated in her civil rights.

And though this process were sufficient to forfeit her of her right, yet she is no party to it; she was not called in the original process; and, though that defect was endeavoured to be supplied, by citing her in a multiplepoinding raised in name of the defender, yet that is not sufficient; Jean was born abroad, consequently is no native of this country; nor has she a *forum ratione originis* here,

therefore is not amenable to this Court, as no method has been used to found a jurisdiction by arrestment or otherwise.

2do, Et separatim, It is true, That by the rules of the civil and canon law, religious persons professed were incapable to hold, but they were not incapable to take; the monastery, as a body corporate, took in right of its several members; in the same manner as by the treason-laws of Great Britain, though an attainted person cannot hold, he can acquire to the King. The civil and canon laws, in all questions of this kind, were held before the Reformation to be the law of Scotland, when not altered by positive constitutions or established usage; and, although other nations have departed from these laws, and have preferred the heir *ab intestato* to the monastery, the law of Scotland has not done so; and the laws of other countries have no authority in Scotland; and therefore, if this question had occurred before the Reformation, when these religious houses had the protection of the law, the monastery would have acquired.

But more particularly, since the Reformation, the law of Scotland, with regard to rights which arise from the Roman catholic religion, is totally changed; that religion being now suppressed, every right consequential thereof is at an end. There is no distinction betwixt religious of one profession and another; they have no *nomen juris* here; the profession itself is disallowed; and it has been the care of the Legislature to regulate, by particular statutes, the rights of succession, acquisition of property, &c. so as most effectually to prevent the growth of popery; but no distinction is made or implied in these statutes betwixt professed religious and others of the church of Rome; neither was there occasion for such distinction as the law now stands reformed.

But the law, however justly severe against Roman catholics since the Reformation, has not carried its rigour so far as to refuse them the common privileges of mankind: Jews, and even infidels, are allowed the benefit of trade with us; the law maintains them in every commercial right and privilege; and makes bills and bonds effectual to them. Roman catholics are not in a worse situation; and, whether particulars, or monasteries, would have action for the price of goods sold, or for payment of bills or bonds granted them. The subject at present in dispute, is a sum of money contained in a personal bond: That Roman catholics in general can hold such rights, is undisputed: That they can maintain action for payment of such sums is equally certain; and, as the law now knows no distinction between one Roman catholic and another; and, before the Reformation, the nearest of kin did not take as in place of the monasteries; in every view of the case, there is no foundation for the pursuer's demand.

To the argument drawn from the statute 1700, it is *answered, 1mo,* The statute refers only to deeds granted directly to these popish societies, or, under cover, to others for their behoof; neither of which is the case here; for, at the date of the bond, Jean Boyd, if then born, was an infant; so it could not be foreseen that she was to become a nun. *2do,* Supposing she was to be con-

No 8.

sidered as an interposed person for the behoof the monastery, the devolution provided by the statute is not in favours of the nearest protestant heir of the donee, but of the donor; in this case, the Earl of Kilmarnock, and, under this character, Malcolm Boyd never could claim.

It was *observed* on the Bench at advising the cause, That although Jean Boyd, not being born in Scotland, has no *forum originis* here; yet as the sum in question is a Scots debt, and the debtor in Scotland, the matter falls to be determined by the rules of the law of Scotland, and the nun is amenable here, and is properly called by the multiplepoinding; and as she had it in her power to claim when she pleased, if any religious notion hindered her, no other person, not having right, could claim.

"THE LORDS repelled the objection to the citation of Jean Boyd, and found, That she is a proper party in this process; but adhered to their former interlocutor, sustaining the defence, That the pursuer has only right to 3000 merks of the sum pursued for."

Act Macqueen et *Advocatus*.

Alt. Lockhart.

Clerk, Kirkpatrick.

W. S.

Fol. Dic. v. 4. p. 38. Fac. Col. No 155. p. 230.

1756. February 12. LILIAS BREBNER and Others, *against* JOHN LAW.

No 9.

If one take an estate to himself in life-rent, and to his son, a papist, in fee, and infestment follow thereon, the protestant heir may insist to be served immediately when the life-rent right ceases.

JEAN CAMPBELL made an entail of her estate of Lauriston to John Law her eldest son, and his male-issue; whom failing, to William Law her third son, and his male-issue, passing over Andrew her second son, and his issue; whom failing, to her nearest heirs whatsoever, under certain provisions and limitations.

By her death, the right of succession devolved upon John Law her son. He possessed the estate until his death, but made not up titles to it.

By his death, the right of succession devolved upon William Law. He was served heir general of tailzie and provision to his brother John; by which service the personal right to the entail, and to the procuratory therein contained, became vested in him.

William disposed the estate of Lauriston in life-rent to himself, and in fee to his son John and his male-issue; whom failing, to the heirs whatsoever of Jean Campbell, under the provisions and limitations contained in the entail above mentioned:

In terms of this disposition, William and John his son obtained a charter, and were infest.

William Law died in France, where he had been long settled, leaving two sons, John and James, both residing in foreign parts.

They had attained the age of fifteen years complete before the death of their father, and had been educated in the popish religion, and continued to profess it.

The pursuers, therefore, as heirs at law of Jean Campbell, being descended from her second son, took out a brieve from the Chancery, in order to have themselves served, in terms of the statute 1700, "nearest and lawful heirs-portioners of tailzie," of the reformed religion, "in general to William Law."

The service was opposed by John Law; and it was *objected* for him; *1mo*, That the pursuers cannot be served heirs of provision to William Law; for that his right was only a right of liferent, and ceased at his death; the right of property is vested in the defender by charter and infeftment; and this right must be set aside before the pursuers can make up titles to the lands of Lauristoun; *2do*, The statute 1700 does not call the next protestant to the succession, unless the popish heir neglect or refuse to renounce popery in the manner prescribed; that is, that the renunciation be made, either before the presbytery within whose limits the heir resides, or before the Privy Council, who might undoubtedly grant commission for administering the formula to one residing in foreign parts. Now, neither of the alternatives can here take place; not the former, for that the defender resides not within the limits of any presbytery; not the latter, for that the Privy Council of Scotland is abolished by the act 6to Annæ; and this part of its jurisdiction has not been vested in any other court.

Answered for the pursuers; *1mo*, William Law, by his general service as heir of provision to his brother John, carried the procuratory of resignation, and the personal right to the estate, which had been settled upon John by the entail of Jean Campbell. William did indeed execute this procuratory, and took the real right to the estate, in favour of himself in liferent, and of his son, the defender, in fee; but the liferent-right ceased by the death of William, and the right of fee is void by the statute 1700; the personal right therefore to the estate must be considered as remaining *in hæreditate jacente* of William, in the same manner as if no infeftment of fee had ever been taken in favour of the defender; and this personal right will be vested in the pursuers by that service in which they insist. To sustain the plea of the defender, would be to invalidate the statute 1700; for that he whose heir was a papist might take the right of lands to himself in liferent, and to the papist in fee; and, upon his death, the papist would be secured, by pleading that he was in the fee, and could not be divested by the statute 1700. *2do*, The incapacity under which the popish heir falls by the statute 1700, is not from his refusing to take the *formula*, but from his professing popery after having attained the age of fifteen. He may remove this incapacity by taking the *formula* in the manner prescribed by the statute. He may either repair to Scotland, and take the *formula* before any presbytery in Scotland, or he may take it before the British Privy Council. The Privy Council of Scotland, and the powers and authorities belonging to it, are abolished by the act 6to Annæ; but the voluntary act of the popish heir in appearing before the Privy Council, can, in no propriety of speech, be termed a power or authority of that judicatory; so that the *formula* may still be taken before his Majesty's Privy Council for Great Britain, the only Privy Council.

No 9.

which now subsists. It is evident, that, according to the defender's plea, a popish heir might, by withdrawing himself into foreign parts, be altogether exempted from taking the *formula*; were this plea sustained, the provision made by the statute 1700, for the security of the protestant religion, would be rendered ineffectual.

"THE LORDS repelled the objections proponed against the service, and allowed the service to proceed."

Act. Miller.

Alt. Sir J. Stewart, Ferguson.

Clerk, Justice.

D.

Fol. Dic. v. 4. p. 38. Fac. Col. No 187. p. 278.

* * * This cause was appealed :

The House of Lords "ORDERED, That the interlocutor complained of be affirmed, with this variation, after the words, "repel the objections proponed against," that the words, "proceeding in," be inserted."

1761. December 20.

ROBERT MAXWEL *against* Sir THOMAS MAXWEL of Orchardtoun.

No 10.

Proof of popery allowed, after the papist's death, to affect the rights of a party contracting with him.

THE estate of Orchardtoun stood devised to heirs-male.

Sir Robert Maxwel of Orchardtoun was twice married; of his first marriage he had a son, afterwards Sir George; and of the second marriage, a son named Mungo.

In his contract of marriage with Mungo's mother, he had bound himself, 'That all and whatsoever lands he should happen to conquest and acquire during the marriage, he should take the rights thereof to himself and her in life-rent, and the heirs to be procreated of her body in fee.'

But, disregarding the right of his eldest son, under antient investitures of the estate, and certain other rights in his person, and likewise the right of his second son under the contract of marriage, he, in the year 1727, disposed his estate to trustees, for the use and behoof of the heirs, male and female, to be procreated of Mungo's body. Soon thereafter he died.

At Sir Robert's death, Mungo had a son, Robert Maxwel, then an infant.

Mungo lived and died a papist; but the *formula* having never been presented to him, he had no opportunity of refusing to take it.

Upon Sir Robert's death, there were the following parties who had claims to his estate, Sir George, as eldest son, Mungo, as heir under his mother's contract of marriage, and Robert, under Sir Robert's trust-settlement; but a contract of agreement betwixt Sir George and Mungo was entered into in the year 1727, whereby Sir George agreed to accept of one part of the estate, and Mungo agreed to accept of the other. In this deed, Mungo signs for himself, and, as taking burden for his son Robert; he accepts, in full satisfaction of all

right, title, or claim, which he or his son had by the decease of Sir Robert; and he renounces and conveys in favour of Sir George, all right, title, &c. conveyed in favour of him Mungo, or his issue by his deceased father.

No 10.

At this time, it was agreed, though not expressed in the deed, that the fee of Mungo's share should be secured to his son Robert; which was accordingly afterwards done by Sir George's making up titles to the estate, and then conveying Mungo's share to Mungo in liferent, and Robert in fee. This transaction was thought at the time beneficial for Mungo and Robert; as it secured them from the hazard of Sir George's getting the whole estate upon a competition.

Mungo died some years after this transaction; and, when Robert came to be of age, he brought a reduction against Sir Thomas Maxwell, son to Sir George of this transaction, as done to the prejudice of his right under his grandfather Sir Robert's trust-settlement.

Sir Thomas's defence was, That Mungo Maxwell, by his mother's contract of marriage, had a right of succession to the estate of Orchardtoun, which Sir Robert had no power to disappoint by a gratuitous trust-disposition to another: That, as Sir Robert had not settled the estate agreeable to the provisions of that contract of marriage, no service as heir of provision was necessary to Mungo's taking the estate: That, the right accrued to him as a *jus crediti*, he being the heir *designative* of the marriage; upon which right he could transact or dispose of it at pleasure: And that accordingly he had, in the transaction of the year 1727 conveyed to Sir Thomas all the right that was in himself.

Answered for Robert Maxwell; Mungo Maxwell having been a papist, was precluded, by the statute against papists, from succeeding at all to the estate of Orchardtoun; and therefore Sir Thomas could not in his right plead an objection to the title of another person.

Replied for Sir Thomas; It is unjust to allow a proof of popery after the papist's death, to affect the rights of parties contracting with him; because, if the objection had been made during his life, he had it in his power to purge the irritancy by taking the *formula*.

"THE LORDS found it proved, That Mungo Maxwell, the pursuer's father lived and died a papist; and therefore, that it is not now competent to Sir Thomas Maxwell, in his right, to set aside the trust-disposition in the year 1727, by which the estate was settled upon the pursuer."

Act. *Advocatus Lockhart, Montgomery.*
Clerk, *Kirkpatrick.*

Alt. *Ferguson, W. Stuart, John Dalrymple.*

7. M.

Fol. Dic. v. 4. p. 38. Fac. Col. No 71. p. 161.

1783. July 15. PETER ROSE WATSON against ELISABETH GORDON.

No 11.

It having been provided by act 1701, c. 3. 'That no person or persons professing the popish religion should be capable to succeed as heirs to any person

A papist may succeed to a lease of lands.

No 11.

‘ whatsoever, nor to bruik or enjoy any estate by disposition, or other conveyance, flowing from any person to whom the papist might succeed as heir any manner of way, until the said heirs purge themselves of popery in the manner prescribed by the statute ;’ a question arose between these parties, Whether a papist could succeed to a lease? The clause above recited being considered by the one as an exclusion of papists from succession in all subjects descending to heirs, while the other contended, that it related to landed property alone.

For Mrs Gordon, the papist, it was

Pleaded ; The rigorous penalties by this statute imposed on persons on account of their sentiments in religion, dictated partly by the critical situation of the protestant interest in the beginning of the present century, and partly by the intolerant spirit of those times, ought at this period to receive the most limited interpretation.

Though on account of its endurance, a lease does not go to executors, and though by particular statute it is endued with a real quality of affecting singular successors in the lands, it is of its nature a contract strictly personal. In common language it is held as a tenure very different from a right of property in lands, and in many instances, instead of deserving the appellation of an estate, contains a very losing bargain on the part of the tenant.

That the expression here used by the Legislature is applied in its most limited sense, is sufficiently apparent. In a preceding clause, after an enumeration of real rights, tacks are mentioned as a separate subject. A power is there given to landlords to assume the possession of lands let to papists, which, though equally requisite for their security if tacks were comprehended, has been neglected here ; and papists are allowed to renounce their errors in ten years, which could be of little avail in rights which seldom endure for more than nineteen years. By the same statute it is declared, that the legal of adjudications shall never expire in the person of a papist ; and, by 10th of Queen Anne, the Sheriff of the county, or any two Justices of the Peace, are empowered to tender the *formula* to patrons suspected of popery ; which would have been entirely unnecessary, if those rights could not be transmitted in succession.— And in practice, bonds secluding executors, pensions, titles of honour, and offices of dignity, although descendible to heirs, are possessed by papists without challenge.

Answered ; As by the first part of this statute tacks are enumerated among the rights which a papist is declared incapable of acquiring, the subsequent clause, which respects succession under the comprehensive denomination of estate, must be understood to have included this sort of possession, which descends to heirs, was in ancient times completed by infefment, and which, as it is capable of enduring for many centuries, may be of infinitely greater value than the right of property itself.

There would have been an obvious impropriety in preventing papists, who are under no disability with regard to moveable rights, from securing or recovering payment of the debts due to them by means of adjudication. But although it were admitted, that the general expression in this clause was so restricted as to exclude these and the other rights specified by Mrs Gordon, which are not particularly mentioned in the former, no reason seems assignable why a lease, which a papist cannot acquire by singular titles, should be valid in the person of his heir, who is of the same persuasion. The statute of Queen Anne, quoted on the other side, was obviously intended to prevent the neglect of the next protestant heir from hurting the interests of the established religion.

THE LORDS were unanimously of opinion, that leases neither fell under the words nor the spirit of this part of the statute. One of them observed, that the reason why tacks, although not real rights, had been included in a former clause, was to hinder papists from disappointing the statute, by obtaining leases of lands for elusory tack-duties. And another observed, that the power given to the next protestant heir to make up titles to the estate by service, as if the papist were dead, implied an exception of tacks, and other rights which are transmitted without service.

THE LORDS preferred Mrs Gordon the papist.

Lord Reporter, *Esqgrow.* Act. Hay. Alt. *Abercromby.* Clerk, *Home,*
C. *Fol. Dic. v. 4. p. 37. Fac. Col. No 114. p. 177.*

* * * From the case of Ferguson against Glendonwyne, 17th February 1803, No 122. p. 8733., *voce* MEMBER of PARLIAMENT, will appear the footing upon which Roman Catholics now stand with regard to holding property.

See APPENDIX.

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PARENT AND CHILD.

1678. December 20.

STRACHAN *against* PATRICK STEWART, Town-clerk of Banff.

No 1.

A FATHER is pursued for a sum furnished to his son. *Alleged* he was forisfamiliar, and entering an advocate, and this lending is *contra S. G. Mucedonium*. THE LORDS found he was liable to have alimented his son according to his quality and estate, so far as the son could not entertain himself by his own industry, and that he was not totally forisfamiliar; and therefore ordained the pursuer to prove the sum was furnished for aliment and the worth of the father's estate, that they might modify accordingly.

Fol. Dic. v. 2. p. 25. Fountainhall, MS.

1685. November 27.

JEAN ROBERTSON *against* Her Father's HEIRS, or M'INTOSH *against* ROBERTSON.

No 2.

JEAN ROBERTSON having pursued her father's heirs, for payment of 500 merks in legacy to her by John Robertson, which was uplifted by her father as administrator in law to her. The defender *alleged* absolvitor, because the pursuer's father in her contract of marriage with her husband, contracted 5000 merks with her, which ought to be ascribed *pro tanto* in satisfaction of the said legacy. It was *answered*, That her father was obliged to pay her tocher albeit he had not been her debtor the manner libelled, and that he had only tochered her suitably to his own estate, he being a gentleman of 2000 merks of rent. It was *replied*, That albeit by the Roman law, the father was obliged to tocher his daughter, yet there was no obligation by our law upon the father to tocher his daughter; and that therefore, what he had given, was to be imputed and ascribed in payment of his debt in the first place, seeing *debitor non præsuntur donare*. It was *duplicated*, Whatever might be said if the father had granted a bond of provision to his daughter, that the tocher might be ascribed in satisfaction thereof; yet in this case, where the legacy was adventitious, proceeding

Though, by the Roman law, the father was bound to tocher his daughter, yet the Lords found it otherwise by the law of Scotland.

No 2. from a stranger, and where the pursuer's contract of marriage did not bear in satisfaction, the defence could not be sustained. THE LORDS sustained the defence, and found, That where a tocher was provided in a contract of marriage, with a daughter, it was presumed to be in satisfaction of the foresaid legacy which she could crave of her father, party contracter of the tocher. See PRESUMPTION.

Fol. Dic. v. 2. p. 25. P. Falconer, No 107. p. 74.

*** Fountainhall reports this case :

THE case of M'Intosh of Daviot against Mr William Robertson of Inches, was reported by Lord Register. A friend leaves Marjory Robertson, Inches' daughter, a legacy of 500 merks ; her father uplifts it, and afterwards marries her to the Laird of M'Intosh's brother, and in the contract of marriage gives her 5000 merks of tocher, but says nothing of the legacy, or that it is in satisfaction of all. Daviot now pursues Inches for the legacy. *Alleged*, it is presumed to be paid, because long posterior thereto he gave her a large tocher of 5000 merks, *et debitor non præsumitur donare*. *Answered*, The brocard is founded on no principle or text of law, but only the doctors invention. *2do*, *Unumquodque eodem modo dissolvitur quo colligatur*, and therefore the legacy being in writ, there must be a formal and specific discharge of it. *3tio*, The contract matrimonial does not so much as bear that the tocher shall be in satisfaction of her bairns part and portion natural, so that Marjory after her father's death was creditor to the family for her legitim and share of his moveables ; *ergo*, if the tocher be not in satisfaction of that, *a fortiori* she may still claim the legacy left her by a stranger ; and his not inserting that clause shews, he minded not to frustrate her of the legacy ; and the paying it by the tocher is but *præsumptio hominis*, which is elided *aliis signis et præsumptionibus*. *4to*, The brocard only holds between debtor and creditor strangers, but not *inter parentes et liberos* ; for law presumes the father's affection to be such, that he will not diminish what his children had formerly right to by the gift of strangers. *5to*, The maxim takes only place *in profectitiis a patre*, but not *in bonis adventitiis* from strangers, as this legacy is. *6to*, A tocher in law is no donation, *quia pater filiam dotare tenetur*, *tot. tit. C. De dot. promiss.* and that on the 15th December 1682, John Grant and Elizabeth Gilchrist, pursuing Robert Pringle for her tocher, who *alleged*, that he had given her household-plenishing to the value, the Lords found the said furnishing did not compensate *hoc loco*, and that his affording horses and carts to carry it away inferred it was gifted ; and so the brocard did not hold here. See PRESUMPTION.

Replied, To the first, that the brocard is founded in positive law, *viz. Omnis donatio sapiens naturam jactationis et dilapidationis in dubio nunquam præsumitur*, l. 25. D. De probat. To the 2d, The legacy is also taken away *scripto*, *viz.* by the contract of marriage. To the 3d, The clause in satisfaction is not *ex neces-*

sitate juris, but *ad majorem cautelam*, to prevent actions from covetous and ungrateful children; and the tocher can only be ascribed in satisfaction of debts *ab ante*, as this legacy was; but not of the legitim, which is posterior, and comes by succession. To the 4th, By the Civil Law parents were bound to tocher their children, l. 19. *D. De ritu nupt.* but with us tochers are donations *nullo jure cogente*; for a moral or natural obligation hinders not but it is still gratuitous, unless there was a civil tie superadded; and if nothing were a donation but where there was no tie at all, then there shall not be an absolute donation in nature. To the 5th, The legacy is not taken from her, but more than remunerate by the posterior tocher. To the 6th, Though a tocher be onerous *quoad maritum, ad sustinenda onera*, yet it is free as to the farther payer. And; in Pringle's case, the plenishing given was but *zenia et dona nuptialia*, which never use to pass for payment of any part of the tocher; and they were not *res fungibiles*, but *species inæstimatæ*, and so could not be given *in solidum* to compensate the tocher, a liquid sum.

THE LORDS adhered to their former interlocutor in March last; and in regard of the practiques, and contract of marriage produced, bearing a tocher of 5000 merks to have been paid by the father, they assolized the defender *simpliciter* from the legacy now pursued for.

Fountainball, v. 1. p. 378.

* * * Harcarse reports this case.

1685. *November*.—A father who was debtor to his daughter, for a legacy left to her by her mother's brother, having contracted a portion with his daughter at her marriage, without the clause, in satisfaction of all that she could ask or claim, &c. her husband pursued for the legacy.

THE LORDS sustained the defence of debtor *non præsumitur donare*.

Harcarse, (BONDS.) No 202. p. 45.

* * * Sir P. Home also reports this case.

1685. *November*.—JAMES ROBERTSON merchant in Inverness, having left a legacy of 500 merks to Marjory Robertson, daughter to John Robertson of Inch, and he having uplifted the legacy, the said Marjory Robertson and Lauchlan M'Intosh of Daviot her son, pursued Mr William Robertson as representing the said John Robertson his father, upon the passive titles for payment of the legacy: *Alleged* for the defender, albeit his father did uplift the legacy, yet he did thereafter give the pursuer his daughter 5000 merks of tocher, which must be understood in the first place to be in satisfaction of the legacy *quia debitor non præsumitur donare*, as is clear by several decisions, particularly 1629, Carmichael against Gibson, *voce* PRESUMPTION, where the father being debtor to a son in a legacy left by the mother, and after the father's decease, the father's executors

No 2. being convened to pay the legacy, it was found that the payment made by the father, for binding the son as apprentice to a craft, ought to be ascribed in satisfaction of the legacy *pro tanto* and ought not to be given *ex pietate paterna*, for it was presumed that he would liberate himself of his debt before he would give any thing, and the day of 1634, against *

where a father having given a bond of provision to his children, did thereafter give them a posterior bond for the equivalent, or other sums, the posterior bond was understood to be in satisfaction of the prior *quia debitor non præsumitur donare*; and the 19th November 1661, Fleeming, No 24. p. 8260., where the Lords found, that a mother who was tutrix to her children, having given out a sum of money in her children's name, to be in satisfaction of the bairns portions, in so far as she was debtor to them in the same, and a donation *pro reliquo*; and Young against Paip, *voce* PRESUMPTION, where the Lords found that a posterior bond of provision in favour of a child, ought to be imputed in satisfaction of a prior provision, unless it could be made appear, that the first bond was granted for an onerous cause; and it is the opinion of the most eminent lawyer that have written on the subject, and particularly Scotanus in his *examen juridicum* upon that title of the digest. *De ritu nuptiarum*, that tochers indefinitely given by parents, are imputed *primo loco*, to be in satisfaction of what the parent is due to the children; and Dowes against Dow, *voce* PRESUMPTION, where the Lords found a tocher granted by a father to his daughter, in her contract of marriage, ought to be imputed in satisfaction of all former provisions, albeit not exprest. *Answered*, that the brocard *quod debitor non præsumitur donare* being but founded upon presumptions, may be elided by contrary and stronger presumptions, according to that principle in law, L. 25. D. De regul. juris, nihil tam naturale est quam eo genere quodque dissolvere quo colligatum est; and Mantica de Conject. ultim. voluntat. lib. 12. tit. 17. No 6—7—8. and 21. lays it down as a rule, that *quod judicatur ex conjecturis, ex conjecturis etiam tollatur, et ut major ratio excludit minorem ita etiam præsumptio potentior contrarium excludit, et inter plures conjectures benigne et favorabiliter accipienda est, veluti si pro liberis indicatur*; which is likewise clear from our own decisions, and particularly Cruickshank against Cruickshank, *voce* PRESUMPTION, where the Lords found that the presumption *quod debitor non præsumitur donare* was elided by stronger contrary presumptions; and the presumption that the father has granted the tocher out of his own means, and not in satisfaction of the legacy left to his daughter, is stronger than that presumption, that the father designed that it should be imputed in satisfaction of the legacy *pro tanto* in the first place; and it is upon that ground, that this brocard by the common law takes no place in donations made by parents to children, as is clear from L. 7. C. De dotis promissione, and the lawyers thereupon, and particularly Perez. upon that title No 7. Verum pater administrator bonorum filix suæ si dotam pro ea promississet censetur eam non ex bonis filix sed ex suis promissi se, præsumptionis ratio est in officio paterno; and No 8. Cum igitur omnio

* See APPENDIX.

paterum officium esse, dicat imperator dotare filias, adventitia, bona filiæ non debent patrem ab hugismodi necessitate liberare, ne quæ in filiarum favorem interducta sunt in earum detrimentum retorquantur; and Christianus upon that book, No 4. 18. and Menoch lib. 3. de presumptione 15.; and if the father had designed that the tocher should have been in satisfaction of the legacy, he would have expressed it, which not being done, cannot be presumed to be in satisfaction of the legacy, and *in casu dubio interpretatio est facienda contra eum qui non apertius legem dixerit*; and this is clear likewise by several decisions, and particularly the 24th July 1723, Stewart against Fleming, *voce* PRESUMPTION, where a posterior provision granted by a father to his natural son, did not take away a prior provision, because it did not bear to be in satisfaction of the first; and the 20th February 1639, The Lord Cardross against The Earl of Marr, *IBIDEM*, where it was found, that a father granting a bond for infesting his son in certain lands, was not satisfied nor taken away, albeit the father did thereafter infest him in other lands of far greater value; and the 5th December 1671, Dickson against Dickson, *IBIDEM*, where it was found, that the maxim, *debitur non præsumitur donare* did not make a posterior bond in favour of a brother's son to be in satisfaction of a former bond granted to that brother, seeing the posterior bond did bear for love and favour, and for no other cause, neither did it mention the prior bond; and the 14th February 1677, The Duke and Dutchess of Buccleugh against The Earl of Tweeddale, No 8. p. 2369., where it is found, that the Countess of Tweeddale, as executrix to her brother David, had right to his bairns' part of his father's executry, which was the eighth part of the inventory, there being no relict; and that David was not obliged to collate a right of land granted to him for love and favour by his father; and it was not presumed to be in satisfaction of his bairns' part, seeing the right did not express the same; and the 29th June 1680, Young against Paip, (above mentioned). And the decisions alleged by the defender do not meet this case; for as to that case of Carmichael against Gibson, (above mentioned), the practick bears, that it was betwixt poor parties whose substance was mean, and the sum small, the legacy being of L. 30, and the prentice L. 5 paid both, and the hail goods in the testament exceeded not L. 200; and this is mentioned to be the chief reason of the decision; and as to the other case of

against

both the first and second bond being granted for the children's provisions, it was reasonable to presume, that the one was granted in satisfaction of the other; and the decision of Fleming against Gibson, (above mentioned), differs from this case, because in that case, the money was lent out by the mother, and the bonds taken in the children's name; and so it was reasonable to presume it to be in satisfaction of the portions *pro tanto* for which she was liable to her children, as tutrix. And it appears by the same decision, that many of the LORDS thought it strange, considering that immediately before, in the same case, the tutrix having given in an article of L. 100 Sterling,

No 2.

that she had paid to Langshaw, and for instructing thereof, had produced his retired bond, with his declaration, that she had paid him, upon which likewise he had given his oath; yet the LORDS found the article ought not to be allowed, albeit they were clear, that the debt was true, and really paid by the executrix; yet seeing she paid, not being an executrix nor tutrix, and cancelled the bond without taking an assignation thereto, they thought she could not distress her children for it, but that it was a donation in their favours, and was not to be imputed in part of their portion; and the decision of Paip and Young does not meet this case, because the tocher being due by contract of marriage, was granted for a most onerous cause, seeing the wife, in contentation thereof, was provided to a considerable liferent, and the children of the marriage to a sum in fee; as also it appears by that decision, that the LORDS inclined to sustain both the provisions; but in respect of the meanness of the father's estate, they thought it was presumable, that the father did not design that both these provisions should subsist, but only, that the first provision should be so far sustained, as the pursuer could instruct the onerous cause of the granting thereof; but the reason does not hold in this case, for not only there was a just and onerous cause for granting of the tocher, being by contract of marriage, but also the father was a man of a good estate. THE LORDS sustained the defence, and found, that the tocher ought to be imputed in satisfaction of the legacy; and found, that the legacy was satisfied by the tocher.

Sir P. Home, MS. v. 2. No 723.

1758. July 11.

BARCLAY against DOUGLAS.

No 3.

A father
liable to pay
an account of
furnishings to
his son, tho'
living separately
from him, he minor,
and not entered to any
employment.

ROBERT BARCLAY, tailor in Edinburgh, sued Archibald Douglas of Dornock, for an account of tailor-furnishings made all at one time to his eldest son, amounting to L. 36.

The debt was contracted by Dornock's son, when eighteen years of age, without aliment or profession, and not living with his father, on account of some differences betwixt them; the debt was high, considering the circumstances of father and son; but for this the pursuer assigned, as the reason, that at the time of contracting it, the son's friends were soliciting a commission in the army for him.

"THE LORDS found the defender liable."

Act. J. Craigie.

Alt. Hew Dalrymple.

J.D.

Fol. Dic. v. 4. p. 39. Fac. Col. No 119. p. 219.

1758. December 2. TELFER against MAXWELL of Dalswinton.

No 4

Father liable for furnishings to his son above majority, while the son was apprentice.

JAMES MAXWELL, son to Hugh, from the age of nineteen to that of twenty-two, during the two first years of which he was an apprentice to a linen manufacturer, contracted some trifling debts to tradesmen, and, among others, one of L. 7 to Telfer, a tailor. There were no complaints that his father had pinched him in his allowance.

In a process at the tailor's instance against the father, the son being dead,
"THE LORDS found the father liable for the debt."

Act. Agnew.

Alt. Hugh Dalrymple.

J. D.

Fol. Dic. v. 4. p. 39. Fac. Col. No 145. p. 256.

If parents may name tutors and curators to their children; See TUTOR and PUPIL.

See ALIMENT.

See IMPLIED POWER.

See RECOMPENCE.

See APPENDIX.

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APPENDIX.

PART I.

PARENT AND CHILD.

1759. March 8.

MARY SCOT *contra* MARY SHARP.

NO. I.

MARY SCOT, daughter of Scot of Highchester, having by unlucky circumstances been reduced to indigence, was alimanted by her mother Lady Mary Drummond, at the rate of L. 20 yearly. Lady Mary, at the approach of death, settled all her effects upon Mary Sharp, her daughter of another marriage, taking no other notice of her daughter Mary Scot than recommending her to the charity of Mary Sharp. After the mother's death, Mary Scot brought a process for aliment against her sister Mary Sharp, founded chiefly on the said recommendation. A proof was taken of the extent of the effects contained in the settlement to the defendant, which amounted to about L. 300 Sterling. It was pretty obvious, that no action either in law or equity could be founded on the recommendation, very different in its nature from an order or command. But then it was stated, that the pursuer being very young when her father died, was educated by her mother in no sort of business by which she could gain a livelihood; and it occurred to the Court, that though the *patria potestas* is such that a peer may breed his son a cobbler, and after putting him in business with a competent stock, is relieved from all further aliment; yet if a son be bred as a gentleman, without being instructed in any art that can gain him a farthing, he is entitled to be alimanted for life; for otherwise a pal-

The general dispo-
nee of a
parent
found ob-
liged to al-
iment a
daughter
left in in-
digence,
with only a
recommen-
dation to
the charity
of the dis-
ponee.

- No. 1. pable absurdity will follow, that a rich man may starve his son, or leave him to want and beggary. Thus Lady Mary Drummond, breeding her daughter to no business, was, by the law of nature, bound to aliment her for life, or at least till she should be otherwise provided ; and the pursuer therefore being a creditor for this aliment, has a good action against the mother's representatives. The Court accordingly found the pursuer entitled to an aliment of L. 12 Sterling yearly, and decerned against the defendant for the same.

Sel. Dec. No. 153. p. 209.

PART AND PERTINENT.

1591. November. COMMENDATOR of New-Abbey *against* TENANTS.

No 1.

MR WILLIAM LESLIE, Commendator of the Abbey of New-Abbey, warned certain tenants that occupied certain yards and crofts of land within the precincts of the Abbey, to flit and remove. It was *excepted*, That they were tenants to one John Maxwell of Kirkconnell, and he had tack and assedation of the hail benefice, except the place of the kirk and the garden; and their master not being warned, they ought not to flit. *Answered*, That in so far as the defenders alleged that the place was excepted, all things that were within the precincts of the Abbey behoved to be excepted, and appertain to the place; which was found by the LORDS, and so they repelled the exception in respect of the answer.

Fol. Dic. v. 2. p. 26. Colvil, MS. p. 472.

1612. June 16. HOME *against* HOME.

No 2.

A PARTY being infeft in lands may charge the possessor to deliver to him the manor-place, being built upon the said lands, albeit he be not infeft *per expressum*, if the house be built upon the land, and have that same denomination, and have been peaceably possessed by the pursuers's predecessors. — A fortalice requires express infeftment, but a manor-place requires no express infeftment; and yet the heritor may charge summarily for delivery of the manor-place after the liferenter's decease, without any warning.

A fortalice requires express infeftment; but a manor-place requires no express infeftment.

Fol. Dic. v. 2. p. 26. Haddington, MS. No 2455.

No 3.

1624. February 7.

NISBET against KING.

IN an action pursued by Mr Patrick Nisbet against James King, advocate, a dial standing in the garden of Drydane, upon a fixed standart, was found to be comprehended in the contract of alienation of the lands, houses, yards, and pertinents of Drydane, as a pertinent of the yard, albeit it was only set upon a prick of iron fixed in the head of the standart, and that it might have been lifted off.

Fol. Dic. v. 2. p. 26. Haddington, MS. No 2996.

No 4.

1627. July 14.

LADY BOYN against Her TENANTS.

IN an action of removing, betwixt the Lady Boyn and her tenants, the defenders *alleging*, that the pursuer was not specially infeft in some particular lands, wherefrom she desired the defenders to be removed; and the pursuer *re-plying*, that they were part and pertinents of the lands contained in her sasine, and that the same lay contiguous together; and the defenders *alleging*, that they lay discontinuous, and had other lands interjected betwixt them whereon they specially condescended; the LORDS preferred the pursuer's reply, upon part and pertinents, and the lying of the same contiguous, to the defender's exception and duply upon discontinuity.

Act. Lowry.

Alt. Baird.

Clerk, Hay.

Fol. Dic. v. 2. p. 26. Durie, p. 310.

No 5.

1628. July 18.

L. LUGTON against SOMMERVILLE.

IN an action, L. Lugton against Hugh Sommerville of Drum, for removing from a rigg of land, which Lugton alleged to be part and pertinent of his lands of Gilmerton, wherein he was heritably infeft, and that the same was so bruiked by him and his predecessors, past memory of man, and possessed by them peaceably; and the defender *alleging*, that he was infeft in another part of the lands of Gilmerton heritably, whereof the rigg libelled was part and pertinent, and which was so possessed by him and his predecessors, past memory of man, the pursuer was preferred in his reply, and the defender's exception repelled; but it would appear, that the pursuer ought to have condescended how he lost his possession, and after what manner the defender apprehended the same, and both parties ought to have been urged to dispute, and make these points clear.

Act. Stuart.

Alt. ———.

Clerk, Scot.

Fol. Dic. v. 2. p. 26. Durie, p. 391.

1630. December 15. LORD YESTER against ———.

No 6.

THE Lord Yester being Baron of ———, pursuing a declarator of non-entry of the lands of ———, which were libelled in his summons, to be parts and pertinents of the said barony; and it being questioned, if it was necessary before sentence, to prove, that the lands foresaid, whereof declarator was sought, were parts and pertinents of that barony, seeing the pursuer's sasine of the barony produced made no mention of these lands; the LORDS found no necessity to prove, that they were part and pertinent, but decerned without that probation, which I think strange, for the sentence must affirm the summons to be proven, albeit nothing be used to prove that part.

Act. *Stuart.*

Alt. ———.

Clerk; *Hay**Durie, p. 548.*

1632. March 1. ANDREW FORSYTH against DURIE.

IN a removing from a rigg of land, as part and pertinent of two acres of land in Dalkeith, wherein viz. the said two acres, the pursuer was infest, the defender *alleging*, That he was in possession of the rigg libelled these ten years bypast, without interruption peaceably, and this pursuer cannot by virtue of this title, which is acquired lately since his possession, and only of two acres of land, and not of this rigg specially, have interest to remove him upon this pretext, as that the rigg libelled were part and pertinent of the said two acres, seeing he offered to prove that the said rigg lyes discontigue from the said two acres, and there are other lands, pertaining to other heritors, interjected betwixt the same; and the pursuer *replying*, that the discontiguity could not be found relevant, to make the rigg cease to be pertinent of the said two acres, seeing, albeit it might thereby appear not to be a part thereof, yet it remained a pertinent thereof, for there are many other heritors and possessors of acres in Dalkeith, who have their acres lying in sundry portions discontigue, as these libelled do; and he offers to prove, that the pursuer's author hath been many years before the defenders possession, in possession of the said rigg libelled, as a part and pertinent of the said two acres, neither hath the defender, nor is he able to shew any right or title to the said rigg: THE LORDS repelled the exception, in respect of the reply, which they admitted to probation, and found that discontiguity made not the rigg to cease to be part and pertinent of the said acres, especially where there was no right alleged to the rigg, in the person of the excipient.

No 7.

In a dispute about a ridge of land as *pertinent*, it was found that discontiguity was no competent exception where the excipient showed no right.

Clerk, *Gibson.**Fol. Dic. v. 2. p. 26. Durie, p. 626.*

No 8.

1634. January 23. EARL of MARR against HIS VASSALS.

IN the action of reduction of the Earl of Marr against Vassals, *alleged* by one Duguid of Auchinhove, That he and his predecessors had been infeft in his lands holding by the King, for the space of 200 years, which lands were designed to lie in the sheriffdom of Aberdeen only, but not within the earldom of Marr, or Lordship of Garioch; *replied*, He offered to prove them parts and pendicles of the earldom of Marr; which reply the LORDS sustained to be proven by public and authentic writs and evidents, with this declaration, That for proving thereof, they would not think the Exchequer rolls sufficient alone, except the pursuer proved it by other evidents beside.

Spottiswood, p. 226.

No 9.

1638. December 11. L. TUSHELAWE against SIR JOHN SCOT.

IN a removing sought from some lands, which the defender *alleged* to be part and pertinent of the lands of pertaining to him heritably, and which have ever been so bruiked by him these many years bypast; and which the pursuer *alleged* also to be bruiked by him continually as part and pertinent of his lands; the LORDS admitted to both the parties to prove, and ordained either of them to adduce six witnesses to prove the same, and after examination of the witnesses, they decerned to remove in favours of the pursuer, who proved clearly, that it was a part of his lands, except some little peice thereof, which was proven to be a part of the defenders lands, and so here contrary probations were admitted to both parties.

Act. Hope and Advocatus.

Alt. Nicolson and Burnet.

Clerk, Gibson.

Durie, v. 2. p. 866.

1662. January 30. LORD BURLY against JOHN SIME.

No 10.

Coals found to be carried by the common clause of pertinents, against one expressly infeft in the coal-heughs of the lands.

THE Lord Burly pursues John Sime for intruding himself in a coal-heugh, wherein the pursuer's author was infeft severally, and not in the land, but only in the coal, with power to set down pits through all the bounds of the land. The defender *alleged* absolvitor, because he stood infeft in the lands libelled, with parts and pertinents, and by virtue thereof, was seven years in possession, which must defend him in possession, until his right be reduced. The pursuer *answered*, That the defender could have no benefit of a possessory judgment, not being expressly infeft with the benefit of the coal, in prejudice of the pursuer, who was expressly infeft, and seased in the coal, and in possession of the

goals past memory. The defender *answered*, there was no necessity of an express infeftment of the coal, which is carried as part and pertinent, as Craig observes in *dieg. de investituris impropriis*, to have been decided betwixt the Sheriff of Ayr and Chalmers of Gaithgirth, and so being infeft, and in possession seven years, he has the benefit of a possessory judgment.

THE LORDS found the defence relevant, but repelled the same, in respect of interruption within seven years, which was proponed.

Stair, v. i. p. 88.

1668. January 15. EARL OF ARGYLE against GEORGE CAMPBELL.

No 11.

Infeftment in a barony carries a burgh of barony, though not expressed.

THE Earl of Argyle pursues George Campbell to remove from a tenement of land in Inverary, who alleged no process, because, the pursuer produces no infeftment of this burgh, or tenement therein. The pursuer *answered*, That he produced his infeftment of the barony of Lochow, and offered him to prove, that this is part and pertinent of the barony. The defender *answered*, That this burgh cannot be carried as part and pertinent, but requires a special infeftment; 1st, Because, by the late Marquis of Argyle's infeftment, in *anno* 1610, produced, this burgh is exprest, and not in the pursuer's infeftment; 2^{dly}, Because in the pursuer's infeftment, there are exprest particulars of far less moment; 3^{dly}, Because a burgh of barony is of that nature, that it cannot be conveyed without special infeftment. The pursuer opposed his infeftment of the barony of Lochow, which is *nomen universitatis*, and comprehends all parts of the barony, although there were none exprest, and therefore the expressing of this particular in a former charter, or less particulars in this charter, derogate nothing; it being in the pursuer's option to express none, or any he pleases; and albeit, in an infeftment of an ordinary holding, without erection in a barony, mills, fortalices, salmon'd fishings, and burghs of barony cannot be conveyed under the name of part and pertinent, yet they are all carried in *baronia*, without being exprest.

“THE LORDS repelled the defence in respect of the reply, and found that this being a barony, might carry a burgh of barony as part and pertinent, though not exprest, albeit it was exprest in a former infeftment, and lesser rights expressed in this infeftment.”

The defender further *alleged* no process, because the pursuer's infeftment is qualified, and restricted to so much of the estate, as was worth, and paid yearly L. 15,000, and the surplus belongs to the creditors, conform to the King's gift, likeas the King granted a commission to clear the rental, and set out the lands to the pursuer, and to the creditors, who accordingly did establish a rental, wherein there is no mention of the lands of Inverary, and therefore they cannot belong to the pursuer. It was *answered* for the pursuer, That he opposes

No 11.

his infeftment, which is of the whole estate, and whatever reservation be in fa-
vours of the creditors, it is *jus tertii* to the defender. It was *answered*, That
the defender's advocates concurred for a number of the creditors, whom they
named, and alleged that they would not suffer the defender to be removed, see-
ing they only can have interest to these lands in question. The pursuer *an-*
swered, That the creditors' concurrence or interest was not relevant, because they
have no real right or infeftment, but only a personal provision, that this pur-
suer shall dispoise and resign the surplus of the estate in their favours, or other-
wise pay them 18 years purchase therefor at his option, whensoever they shall
insist *via actionis*, the Earl shall declare his option, but they having no infeft-
ment cannot hinder the donatar to remove parties having no right, which is
the creditors' advantage, and cannot be stopped by a few of them, likeas the
whole barony of Lochow is set out by the said commission, to the pursuer him-
self, conform to their sentence produced.

" THE LORDS did also repel this defence, and found that the provision in fa-
vours of the creditors, could not stop this removing." PERSONAL AND REAL.

Fol. Dic. v. 2. p. 25. Stair, v. 1. p. 505.

No 12.

A minute
disposing
lands with
parts and per-
tinent, found
to dispoise
common pas-
turage in a
muir at the
time of the
bargain, pos-
sessed along
with the
lands.

1668. February 14. WILLIAM BORTHWICK against LORD BORTHWICK.

WILLIAM BORTHWICK having charged the Lord Borthwick for payment of a
sum of money, he suspends, and *alleges* that William is debtor to him in an
equivalent sum, for the price of the lands of Halheriot, sold by my Lord to
the charger, conform to a minute produced. The charger *answered*, That the
reason was not relevant, unless the suspender would extend and perfect the mi-
nute, which my Lord refuses, especially and particularly to subscribe a dispo-
sition of the lands, with common pasturage in Borthwick muir. The suspender
answered, That he was most willing to extend the minute, but would not
insert that clause, because the minute could not carry nor import the same,
bearing only a disposition of the lands, with parts, pendicles, and pertinent
thereof, which he was content should be inserted in the extended disposition,
and it was only proper after the infeftment was perfected, that the charger
should make use of it, so far as it could reach, which he was content should be
reserved as accords. *2dly*, If he were obliged to dispute the effect of it, it
could not extend to pasturage in the muir of Borthwick, *1st*, Because a special
servitude of a pasturage in such a muir, requires an express infeftment, and
cannot be carried under the name of pendicles, parts, or pertinent, albeit the
muir were contiguous, and the common muir of a barony; but, *2dly*, This
muir lies discontiguous from the lands of Halheriot, and my Lord's lands lie be-
twixt, and do not belong to the whole barony, but to some of the tenants of
it only. The charger *answered*, That this being a minute, behoved to be ex-
tended in ample form, expressing all rights, particularly that the right *de jure*

could carry, and there was no reason to make him accept of lands with a plea; and *de jure* pendicles and pertinents do well extend to common pasturage, when the said pasturage is so possessed; and it cannot be controverted, but the heritors and possessors of Halheriot have been in undoubted possession of common pasturage in this muir, and that the rent payable therefor is upon consideration of the pasturage, without which, it could neither give the rent it pays, nor the price; so that when my Lord disposes the lands, with the pertinents, and at the time of the disposition, this pasturage is unquestionably possest as a pertinent of the land, the extended charter and disposition ought in all reason to comprehend it expressly; neither is there any difference whether the pasturage be of a muir contiguous, or belonging to the whole barony, seeing it cannot be controverted, but it was possest as pertinent of this room the time of the bargain; and to clear that it was possest, the charger produced a wadset granted by the Lord Borthwick to himself of the same room, bearing expressly pasturage in the common muir of Borthwick. The suspender answered, That the wadset made against the charger, in respect this clause being express in the wadset, he had not put it in the minute, which as *jus nobilius* absorbed the wadset, and cannot be looked upon as a discharge of the reversion only, because my Lord was superior by the wadset, and by the minute he is to resign, likeas in the minute there is a disposition of the teinds, which is not in the wadset.

THE LORDS found that the minute ought to be extended, bearing expressly the common pasturage in the muir of Borthwick, in respect the same was a pertinent of the lands, sold the time of the bargain, and was not excepted.

Stair, v. 1. p. 523.

1669. July 2.

LAIRD OF GRUBBET *against* MORE.

THE barony of Linton belonging to Sir John Ker of Littledean, the lands of Morbattell and Otterburn are parts thereof; there is a piece of land called Greenlaw, lying in the borders of Morbattell and Otterburn, and there is an heritable right of the lands of Otterburn granted by Sir John Ker to one Young, and by that Young a subaltern right to another Young, bearing the lands of Greenlaw *per expressum*. Both these Youngs jointly dispose to Grubbet the lands of Otterburn, with the pertinents, comprehending the lands of Rashbogs; in the end of which disposition there is a clause, bearing, that because the Youngs were kindly tenants in the lands of Greenlaw, therefore they dispose their right thereof, and kindness thereto to Grubbet. More having acquired the rights of the lands of Morbattell from Sir John Ker; and the Earl of Lothian having apprised Sir John's right of the barony of Linton, in anno 1636, gives a particular right of Greenlaw alone, which is now also in the person of More; whereupon arises a competition of right between Grubbet and More,

No 13.

In a competition, personal service to the superior ascertained by tack or enrolment of Court, was found sufficient to ascertain, of which property the disputed subject was part and pertinent.

No 13.

Grubbet *alleged*, That he has right to Greenlaw, as a part and pertinent of Otterburn, which he and the Youngs, his authors, have possessed far beyond 40 years, as part and pertinent of Otterburn; and offers to prove, that there are standing marches between Morbattle and Otterburn, within which marches Greenlaw lies on Otterburn side, and that his infeftment produced granted by Young to Young, bears expressly Greenlaw. It was *alleged* for More, *First*, That Grubbet cannot pretend Greenlaw to be part and pertinent of Otterburn, because by his own infeftments produced, granted by the Youngs, and accepted by him, Greenlaw is not expressed as part and pertinent of Otterburn, albeit Rashbog, though less considerable than it, be expressed; and, on the contrary, it is declared that the Youngs were kindly tenants of Greenlaw, and disposed their kindness thereof; and offers to prove that the Youngs were in constant custom of service to Sir John Ker in arms, and otherwise, whenever they were required, and that most of the lands on the border were set only for service, which service could not be attributed to Otterburn, because it was holden blench of Sir John, and if need be, offered to prove by witnesses, that when the said Youngs came not to the said service, they were pointed therefor. *2dly*, More offered to prove that Greenlaw is a distinct tenement, both from Otterburn and Morbattle, and hath past as a distinct tenement since the year 1636, and hath a known march between it and Otterburn, viz. a knoll. *3dly*, For Grubbet's pretence of bruiking Greenlaw as part and pertinent of Otterburn for 40 years, so that he might claim it by prescription, the allegiance ought to be repelled, *first*, Because prescription cannot proceed without an infeftment, and it cannot be ascribed to the Youngs' infeftment, wherein they acknowledge that they were kindly tenants of Greenlaw, after which no course of time can ever prescribe a right to Greenlaw, as part and pertinent of Otterburn by that charter, and therefore any possession that is thereof is without infeftment. *2dly*, There is not 40 years possession abating More's minority. *3dly*, There are interruptions, and therefore if Greenlaw be either a distinct tenement, or part of Morbattle, it belongs to More. It was *answered* for Grubbet, That he and his authors possessing Greenlaw these 40 years past, as part of Otterburn, gives him sufficient right thereunto, notwithstanding of any acknowledgment in the charter, or without the charter before that time, for prescription may change part and pertinents, so that which was once not acknowledged to be a part by possession, 40 years thereafter may become a part, and that acknowledgment never being made use of prescribes, and the charter in which it is, is a sufficient title, both for what was parts the time of the charter, and what becomes thereafter parts by prescription. *2dly*, The acknowledgment of a party having right is of no effect, when by demonstration of the right itself the contrary appears, as here, there being an anterior right of property of the Youngs produced before that acknowledgment. *3dly*, The acknowledgment is not, that they were only kindly tenants, otherwise it is very well consistent with the property, that they being first kindly tenants, and that kindli-

ness being thought more favourable to maintain possession in these places, than any heritable right, they might very well dispone Otterburn, whereof Greenlaw is a part, and might also dispone their kindness of Greenlaw they had before the right of property; neither doth it infer, because Rashbog is exprest as part and pertinent of Otterburn, which hath been upon account that Rashbog was then unclear, that therefore Greenlaw is no part thereof, or else it could have no more parts but Rashbog, there being no more exprest; and as for the alleged services done by the Youngs to Sir John Ker, they cannot infer that the Youngs were then tenants of Greenlaw, because such services being only general, and no particular services accustomed by tenants, they might have been performed to Sir John as superior, or as out of kindness to a great man in the country; and it is offered to be proved (if need be) that hundreds granted such service, who were not tenants; so that unless there were a tack, inrolments of Court, or executions of pointing produced to instruct services as a tack-duty on Greenlaw, it is irrelevant.

THE LORDS, by a former interlocutor, had found, that, by the acknowledgment in Young's charter, or any thing therein was not sufficient to exclude Greenlaw from being part and pertinent of Otterburn; but they found that if More would allege a tack or inrolment of Court to the Youngs of services for Greenlaw, it were sufficient, or otherwise if he would allege constant service of the Youngs, by riding, &c. with Sir John, and their being pointed by him when they were absent, they found the same, with the acknowledgment in Grubbet's right, to exclude Grubbet from Greenlaw; and if these were not alleged, they ordained witnesses to be examined upon the ground *hinc inde* before answer, upon these points, whether Greenlaw was known to be a distinct tenement, both from Otterburn and Morbattle, or whether it was known to be part and pertinent of either, and what were the marches and meithes thereof, and what services were done by the Youngs to Sir John Ker, and if such services were done by others, not being moveable tenants.

Stair, v. 1. p. 629.

* * * Gosford reports this case:

In the declarator of property of the lands of Greenlaw, (*See APPENDIX*) it being *alleged* in fortification of Grubbet's right, That More of Otterburn, conform to his disposition, wherein it was acknowledged, that he was a kindly tenant and possessor of the said lands; he and his authors had done service as tenants, by riding with Sir John Ker of Littledean, who was common author to both parties; the LORDS, before answer, ordained a visitation of the said lands; and that both should lead witnesses, as to the marches and bounds thereof; and the manner of possession, if it was property or a tenandry, and the manner of service by riding, if it was only prestable by tenants or vassals. Notwithstanding, it was *alleged*, That riding, by custom of the borders, was not a proper service of tenant only, but ordinarily was performed by

No 13.

vassals, or friends and neighbours to great persons, and that such a qualification of service could not be sustained to interrupt More's right of property and make him a tenant, unless there were a tack or rental produced, bearing, that riding was a part of the duty or service.

Gosford, MS. No 154. p. 61.

No 14.

A separate tenement may become part and pertinent of another tenement by long possession.

1671. November 17.

YOUNG against CARMICHAEL.

WALTER YOUNG having apprised a piece of waste ground in the west side of Mary King's closs, and being therein infeft, pursues William Carmichael to remove therefrom, who *alleged* absolutor, because he stood infeft in a tenement on the east side of the closs, over against the waste ground in question, with parts and pertinents, and possessed the waste ground as part and pertinents of his tenement the space of 40 years, and thereby prescribed a right thereto. It was *answered*, That no prescription can take place by possession, without a title; but the defender's infeftment could be no title for possessing this waste ground; *first*, Because it was *separatum tenementum*, bruiked by a several infeftment competent to the pursuer's author, from whom he had apprised and produced his predecessor's infeftment *in anno* 1556; *2do*, The defender's infeftment is bounded, and bears his tenement to lie upon the east side of King's closs, and so can be no title to possess this waste ground lying upon the west side of the closs. It was *answered*, That there being no infeftment of the waste ground since the year 1556, it might become part and pertinent by long possession;—"Which the LORDS found relevant, but withal found that the defender's infeftment being bounded, as said is, could be no title for the prescription of this waste ground lying without the bounding."

Fol. Dic. v. 2. p. 26. Stair, v. 2. p. 3.

No 15.

Found in conformity with the above.

1675. February 20. COUNTESS of MORAY against WEMYSS.

THE Countess of Moray pursued Mr Robert Wemyss to remove from two pieces of land, the one called Harroneas land, the other called Alexander's land. It was *alleged* for the defender, Absolutor, because he bruiked these lands as part and pertinent of his lands of Cuthil Hill by the space of 40 years, and so not only hath the benefit of a possessory judgment, but an absolute right by prescription. The pursuer *answered*, That the Earl of Moray was infeft in these pieces of land *per expressum*, as severall tenements, and so could not be pertinent of any other land, and produceth his charter, together with a tack set by the Earl of Moray *in anno* 1606 to Wemyss, then heritor of Cuthil Hill, for 19 years, expresly bearing the same designation, so that the defender's author having attained possession by a tack, his possession was the Earl of

Moray's possession, and the lands are bruiked *per tacitam relocationem* ever since, and so cannot prescribe against the Earl's successors. It was *replied* for the defender, *Non relevat*, because that which was not *ab initio* part and pertinent, may by prescription of 40 years become part and pertinent, even though it had been of before a several tenement, neither will so ancient a tack exclude prescription, because there are more than 40 years since the issue thereof, during which time it cannot be continued by tacit relocation, because tacit relocation is a contract by mutual consent of parties tacitly inferred by the heritors not warning, and the tenants not renouncing, which therefore cannot reach to singular successors. *Ita est*, That it is more than 40 years since Wemyss was denuded, after which the singular successors possessing only *proprio jure*, it cannot be said to be the Earl of Moray's possession, nor tacit relocation.

THE LORDS found that the prescription by possession of 40 years, as part and pertinent, was relevant, albeit before that time the lands so possessed had been a several tenement, unless there had been interruption, and that tacit relocation could not extend to singular successors.

Fol. Dic v. 2. p. 26. Stair, v. 2. p. 325.

1697. January 15. LITHGOW against WILKIESON.

No 16.

A seat in church and burial ground go as part and pertinent of the estate conveyed.

THERE was a debate between Lithgow in Melross and Wilkieson, about a seat in the kirk. The first claimed it by virtue of a disposition of the lands to which the seat pertained; and though it was not expressed *nominatim* in the disposition, yet it was not only carried as part and pertinent of the land, but was also conveyed, in so far as the lands were disposed conform as he had possessed them by a former tack, which mentioned the seat. Wilkieson's right was a posterior disposition to the seat *per expressum*, upon this narrative, that the prior disposition made no special mention of the seat. THE LORDS found it comprehended under the first disposition, and that both seats in churches and burial places were not *inter res sanctas et religiosas* so as to be *extra commercium*, but were conveyable by infeftment, and affectable by creditors; though some of the Lords urged, that whatever property private parties might have in the timber and materials of a kirk-seat, yet as to the *solum*, the ground right and place whereon it stood, the same belonged only to the minister, and his elders making up the kirk-session, to dispose upon the same and divided it equally among the heritors and parishioners; else many absurdities might follow, if an heritor sell off a great part of his barony, retaining still his seat, how shall these buyers be provided; what proportion of the church shall they have; shall they who at last acquire the mansion-house get the whole room in the church pertaining to the entire barony? On the other hand, if an heritor build an isle, shall the kirk-session have the power, on his ceasing to be heritor, to give it away to

No 16.

the prejudice of his singular successor in the lands? And though some inclined to find that neither of the competitors could have right, yet it carried *ut supra*.

1698. November 18.—THE LORDS decided the competition betwixt Lithgow and Wilkieson, for the right to a seat in the kirk of Melross. The one claimed it by virtue of a disposition from the former possessor, from whom he had bought some acres. The other had a disposition both to the mansion-house and the seat, and alleged it behoved rather to belong to him. Sundry points were debated, whether a kirk-seat follows the land as part and pertinent, or if it require an express disposition *nominatim*. 2do, If an heritor, who got a considerable share in the church, because of his great interest in the parish, shall sell it off in parcels to severals, and then last of all the mansion-house, whether the seat divides among them all proportionally effeiring to their respective interests, or if it follows the mansion-house *in solidum*; seeing seats are bestowed conform to a person's dignity and rank, or their estate, or numerous train of family, and these may not concur in him who buys from him. 3tio, Whether seats may be possessed as any other property and civil right, or if they be at the disposal of the minister and kirk-session, so that no more but the frame and timber of the seat belongs to the possessor, but the area and ground whereon it stands are at the kirk's disposal. This was moved, but it was thought in many places of Scotland seats were possessed as property. The Earl of Haddington, as patron, appeared in this process, and concurred with Wilkieson, and *alleged*, a superior and patron ought to be considered in the disposal of the church. THE LORDS abstracted from all these nice points, and would only determine who had the preferable right of the two parties before them; and, by plurality of votes, found Lithgow had the best right.

Afterwards, on a bill and answers, the LORDS were equally divided; and the President, by his vote, preferred Wilkieson's right to the seat.

Fol. Dic. v. 2. p. 26. Fountainhall, v. 1. p. 756. and v. 2. p. 13.

1709. December 23.

Captain HENRY BRUCE, Brother to the Laird of Clackmannan, *against* Mr WILLIAM DALRYMPLE of Glenmure, and ALEXANDER INGLIS of Murdiston.

No 17.

An orchard
discontiguous
from the
mansion-
house, found
to fall under
the general
words houses
and yards.

IN the pursuit at the instance of Captain Bruce against Mr William Dalrymple and Alexander Inglis, for implementing a decret-arbitral pronounced by Sir Hugh Dalrymple President of the Session, by disposing to the pursuer the house and yards of Clackmannan, who claimed an orchard separated from the house by some arable ground interjected, as falling under the general of yards,

Answered for the defenders; By house and yards joined together *uno spiritu*, are only meant yards contiguous to the house, for the use and service thereof; whereas, the orchard acclaimed is both discontinuous and differs from a yard, as is clear from all charters wherein yards and orchards are expressed by different words, viz. *cum hortis et pomariis*.

Replied for the pursuer; The general term yards or *borti* (so called *quod ibi arbores et olera oriuntur*) comprehends gardens and orchards; and we are not to think *pomarium*, an orchard to be a distinct species from *bortus*, because mentioned together in charters, seeing synonymous words are frequently added in charters.

THE LORDS found the Captain had right to the orchard libelled, as comprehended under the general word yards in the decret-arbitral.

Forbes, p. 372.

* * * Fountainhall reports this case :

MR WILLIAM DALRYMPLE of Glenmuir and Alexander Inglis, having purchased in all the preferable debts upon Bruce of Clackmannan's estate, and resolving to bring it to a roup, Sir John Shaw of Greenock designing to be the purchaser, to facilitate the way, he enters into articles of agreement with Captain Hary Bruce, Clackmannan's brother, whereby, for his consent and other prestations, he obliges himself to let him have the house and yards, and ten chalders of victual most contiguous and adjacent thereto, for continuing and preserving the memory of such an ancient family in the surname of Bruce; and thereafter having submitted all their differences to my Lord Northberwick, President of the Session, he, by his decret-arbitral in 1701, decerns Glenmuir and Mr Inglis to denude themselves in favours of Captain Bruce of the house and yards of Clackmannan, and of ten chalders of victual of free rent, the lands of Tilligart estimated at 8 chalders of victual being a part thereof, and the rest out of the superiorities and feu-duties of the said estate, &c. Hary Bruce pursuing for implement, it was *alleged* for Glenmuir, He was ready to fulfil, by disposing the lands of Tilligart at eight chalers of victual, and as much adjacent land as would make up the remanent two chalders. *Answered*, I am willing to accept Tilligart in part, but cannot take them at that rental, because he offers to prove they are scarce worth six chalders of victual; and though the decret-arbitral estimates them at eight, yet that is no part of the decerniture, but a mere guess and conjecture upon Andrew Inglis' information and assertion that they paid so much; and though they were once set at that rent and four bolls more, yet that was only occasioned by strong labouring and liming, which is now worn out, and the tenant became unable to pay it, and broke; and he is willing to take it at whatever it shall be proved that it may pay as a standing rental; but certainly all parties designed to give him ten chalders of victual effectively, and not at a racked imaginary rental; and

- No 17. Vinnius *ad tit. Inst. De act.* tells us *iudices compromissarii* must proceed as to material justice *eadem ordine*, that the *veri iudices* do. *Replied*, There is neither dubiety nor ambiguity in the clause of the decreet-arbitral, for it expressly determines that Tilligart shall be taken for eight chalders of the ten, and Captain Bruce can least quarrel this of any man living; for two years after the decreet-arbitral he set a tack of it for that. THE LORDS, by plurality, found he behoved to take it for eight chalders of victual, suppose it should now pay less. The next point disputed was, he claimed an orchard at some distance from the house, as falling under the designation of the yards obliged to be disposed to him. *Alleged*, That word comprehended no more but the yards and gardens adjacent to the house, which they were willing to dispoise to him; but there were sundry acres of land interjected betwixt this orchard and the mansion-place; and there is a coal-sink put down in the midst of it, and it is of a great extent; and in the enumeration of charters, *cum hortis et pomariis* are different things; the first, in our stile signifying a yard, and the other an orchard set with fruit trees. *Answered*, They are truly synonymous words of the same import and signification. Littleton deriving the Latin *hortus* from *ortus*, *quia ibi arbores et olera oriuntur*. THE LORDS found the yards comprehended likewise this orchard, and gave Captain Bruce right thereto.

Fountainball, v. 2. p. 545.

1714. July 2.

SIR ROBERT DUNBAR of Northfield *against* SINCLAIR of Dun and SINCLAIR of Lyth.

No 18.

In a declarator of right in a commonalty, the pursuer was required to produce a progress of rights for 40 years, as a warrant of his author's possession.

IN the action at the instance of Sir Robert Dunbar against Sinclair of Dun and Lyth, for declaring his right of commonty in a muir lying betwixt his lands of Gilloch and those possessed by the defenders; the pursuer founded upon his charter and sasine in the said lands, with their parts and pertinents in the year 1708, and offered to prove, that the muir in question was always reputed to pertain in commonty to the said lands, and was possessed as such by him and his authors time out of mind.

THE LORDS found no process at the pursuer's instance, unless he could produce a progress 40 years backward as a warrant of his authors' possession; and ordained him to produce his authors' rights.

Albeit it was *alleged* for the pursuer, That he standing possessed of the undoubted property of the lands of Gilloch by virtue of the charter and sasine produced, his authors *præsumptione juris* are understood to have had the same right which was a title as sufficient for their possession, as his infeftment is for his, unless his title be reduced. *2do*, In the present question, he does not pretend to have acquired right by possession as of a separate tenement, in

No 18.

which case, he should certainly have been obliged to produce a prior title; he only pleads that the commonity of that muir is part and pertinent of those lands, which are and have been his author's unquestionable property, and alleges possession as a proof, not as a title of prescription.

Forbes, MS. p. 75.

1714. November 17.

JANET CRAWFURD LADY DALEGLES, Elder, *against* JOHN CRAWFURD, now of Dalegles, and MARGARET CUNNINGHAM, his Mother and Tutrix.

No 19.

A moss, with the same name as the lands contiguous, found to be part and pertinent.

THE Lady Dalegles, elder, by her contract of marriage, was infeft in liferent of the one merk land of Nether Fardin *alias* Rigfoot; and there being a moss called Fardin Moss, which lies betwixt the said land and the one merk land of Dalegles, but contiguous to both, the old Lady contends, That the said Fardin Moss is part and pertinent of Nether Fardin, her jointure lands; and Dalegles, her grandson, contends it to be part and pertinent of the one merk land of Dalegles.

Alleged for the Lady; *1mo*, That the very name of Fardin Moss shows that piece of ground to belong to Nether Fardin; *2do*, The same appears from the thing itself, since otherwise there would be a very odd inequality betwixt the rents of the two several merk lands, the rent of Dalegles being betwixt 3 and 400 merks, and the rent of Fardin Moss 70 merks, and the remainder of Nether Fardin but 110 merks; so that Dalegles will be above a third more than Nether Fardin, comprehending Fardin Moss, and three times as much as the remainder, wanting Fardin Moss; an inequality too great to be presumed between neighbouring tenements of the same valuation.

Answered to the 1st, That the lands of Nether Fardin are also called Rigfoot, and so denominated in the Lady's contract; whereas there is another room not liferented by her, which is called Over Fardin, also contiguous to the moss in question; so that if any argument can be drawn from the name, it would more naturally apply to the Over Fardin, which still keeps the name of Fardin, than to Nether Fardin, which has also another name. To the 2d, *answered*, That the disparity betwixt the rooms can be no argument, otherwise the pursuer, to make an equality, might contain not only the moss, but the third more of Dalegles; since, even though the moss were joined to Nether Fardin, by the pursuer's own computation, the lands of Dalegles would be double the rent thereof; and, if two neighbouring merk lands could differ so far, the small addition of the rent of the moss can afford no argument.

THE LORDS found the lands of Fardin Moss, in controversy, to be part and
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No 19. pertinent of the lands of Nether Fardin *alias* Rigfoot, wherein the pursuer is infest in liferent.

For the Old Lady, *Stevenson.*

Alt. *Boswell.*

Clerk, *Gibson.*

Bruce, v. 1. No 24. p. 32.

1716. June 28.

Lady MARY BRUCE, and her Husband, *against* Colonel JOHN ERSKINE.

No 20.

A disposition to a house, yard, and parks, found to comprehend the coal within the same as part and pertinent.

THERE having been a submission entered into by Colonel Erskine for himself, as purchaser (by a decret of sale) of the estate of Kincardine, and in name of the creditors, on the one side, and Lady Mary Bruce, to whom the said estate was conveyed, by the late Earl her brother, and the Countess her mother, on the other side; there followed thereon a decret-arbitral, wherein, among other things, the Colonel is ordained to dispoⁿe to Lady Mary the house, yards, and parks, by virtue whereof she also claimed right to the coal within the same, which coal had been anciently in a separate author's hands from him that possessed the lands. This decret coming to be quarrelled in a suspension, among many other points, this touching the coal was objected against by the Colonel.

And it was *contended* for him, That, in the decret-arbitral, the coal ought to have been reserved for him; seeing, by the decret of sale, he had right to the whole coal of the estate of Kincardine; and that the arbiters had made an infringement upon the same, by finding, that Lady Mary had right to a part of the lands, without mentioning the coal; yet finding that the Colonel had right to the hail remainder of the estate; therefore the coal must be understood reserved to him.

Answered for the Lady; That the coal being part and pertinent, and she being found by the decret arbitral to have right to such lands, she must likewise have right to the coal thereof.

Replied for the Colonel; That it is no unusual thing that the coal will be thus separate, and that there are different proprietors of land and coal; and being originally separate in the present case, and *distincta tenementa*, a decret-arbitral with respect to lands only ought not to be understood to comprehend the coal.

THE LORDS found, that the house, yards, and parks, to be disposed to Lady Mary by the decret-arbitral, comprehended the coals within the same.

Act. *Boswell.*

Alt. *Sir Walter Pringle.*

Clerk, *McKenzie.*

Bruce, v. 2. No 7. p. 11.

1716. July 5. GLENDONWYNE of Parton, *against* GORDON of Kirkland.

IN a declarator at Parton's instance, of his right to a piece of ground called the Parson's Isle, as part and pertinent of the barony of Parton, whereof, nevertheless, Kirkland and his authors had been in immemorial possession, but had only an old charter, but no sasine thereon; it was, among other things,

Alleged for the pursuer; That possession, though never so long continued, cannot make a right without a title, since the act 1617, anent prescription, requires charter and sasine, and 40 years peaceable possession, or sasines one or more continued upon retours or precepts of *clare constat* during that space; none of which the defender had produced.

Answered for the defender; That the land in controversy having been possessed by him and his authors, as part and pertinent of his lands of Kirkland, this immemorial possession, as in any case, it may establish part and pertinent; so especially ought it to have this influence in a question with respect to church-lands, (and such the Parson's Isle is, as appears by its very name and designation), which have a special privilege; so that, even by the act of sederunt 1612, the Lords declare they will decide all questions arising anent the right to church-lands by possessing for 40, at least for 30 years immediately preceding the entering of their actions. And it is observed by the Lord Stair, tit. Infeftments of Property, (b. 2. tit. 3.) That 37 years possession before the reformation, or 13 years thereafter, without interruption, is sufficient to stand for a right of kirk lands.

2do, Though, in the common cases of prescription, sasines be required; yet, in the question of church-lands, where the rights are much more defective, any colourable title, joined with possession, should be sufficient; and here the defender had produced an unquestionable document, viz. a charter, though the original sasine be amissing, which must be presumed from the long continued possession, especially considering that it was before the act appointing registration of sasines, when possession was much more considered than the sasine, which was not at that time much in use to be given, as the Lord Stair observes out of Craig, tit. Infeftments of Property, § 16.

THE LORDS found an immemorial possession relevant to continue the immemorial possessor in the possession, ay and while the pursuer produce a special right to the subject in debate. See POSSESSION.

Act. *Al. Fergusson.*

Alt. *Boswell.*

Clerk, *McKenzie.*

Bruce, v. 2. No 12. p. 15.

No 21.

A person having been in immemorial possession of a piece of ground, as part and pertinent of his estate, tho' without a special title, the Lords found an immemorial possession relevant to continue the possessor in possession, until a special right should be produced in favour of another.

1769. June 29.

DUFF against BRODIE.

No 22.

Seat in a church carried by a disposition of lands.

THE question was, Whether a seat in a church was understood to be carried by a disposition of lands, without being expressed in the disposition.

Brodie of Windyhill had disposed to Earl Fife, the lands of Muirtown, in the parish of Elgin, but without any mention of a seat in the church, which had been immemorially possessed by the proprietors of that estate. It appeared that the church had been rebuilt in 1683, at the joint expense of the burgh and of the heritors, who were assessed in proportion to their valued rent. So that the question came to be much the same as if it had occurred in the case of a country parish, though the defender endeavoured to distinguish it, by observing, that, in burghs, it was common for persons to acquire right to seats, without any relation to particular lands. But it did not appear that Mr Brodie's seat was in that situation.

THE LORDS found the pursuer entitled to the seat, as part and pertinent of his lands.

Reporter, Barjarg.

Act. Arthur Duff.

Alt. John Douglas.

G. F.

Fol. Dic. v. 4. p. 40. Fac. Col. No 98. p. 353.

1770. November 21.

GRIZEL PEDEN against The MAGISTRATES and TOWN COUNCIL OF PAISLEY.

No 23.

Seat in the church, not expressly conveyed, goes as part and pertinent of the landed estate.

THE estate of Cochrane of Ferguslie being brought to a judicial sale, the country estate, lying within the barony parish of Paisley, was purchased by the Magistrates, and a tenement and garden in the town by Bethia Cochrane. There was also a seat in the church which belonged to Ferguslie, but of which no mention was made in the decret of sale, or in any of the rights granted to either of the purchasers. Mrs Cochrane, the purchaser of the house and tenement, had made use of the seat for several years; and having, in 1765, conveyed these subjects to Grizel Peden, she claimed the seat in the church as part and pertinent of her property. She was opposed by the Magistrates of Paisley; and the Sheriff found, that the pursuer, as disponent of Mrs Bethia Cochrane to a house in the town of Paisley, has no right to the seat in the church libelled.

Mrs Peden advocated the cause; but the Lord Ordinary remitted the same to the Sheriff *simpliciter*.

In a reclaiming petition, she maintained, That as the rights of neither party expressly conveyed this subject, it would pass as part and pertinent of her property; that it was such, was ascertained and explained by the possession. And

in support of her argument, she referred to Fountainhall, 15th January 1697, No 23; 18th November 1698, Lithgow *contra* Wilkieson, No 16. p. 9637.

The Magistrates *answered*; That the seat in the church, like the burial-place or other appendages, fell naturally to be considered as a part and pertinent of the landed estate lying within the parish, and not of a town house in the burgh of Paisley, which was not said to be the mansion house, or to have any connection whatever with the landed property. The case mentioned from Fountainhall was adverse to the pursuer's plea; as the lands and mansion house had been separated, and the seat in the church conveyed with the house *per expressum*.

THE LORDS unanimously adhered.

Lord Ordinary, *Kennet*.

For the Magistrates of Paisley, *Ilay Campbell*.

For Peden, *B. Hepburn*.

Clerk, *Campbell*.

R. H.

Fac. Col. No 49. p. 139.

1777. June 17. ROSE *against* RAMSAY.

No 24.

THE LORDS found, that mills were carried by a disposition of the lands with parts and pertinents. See APPENDIX.

Fol. Dic. v. 4. p. 40.

1787. November 20.

ROBERT CARMICHAEL, and Others, *against* Sir JAMES COLQUHOUN.

No 25.

THE title-deeds of Sir James Colquhoun's estate bear his right 'to the fishing of salmon, and other fishings, in the water of Leven.'

Mr Carmichael, and other proprietors of the grounds lying along the banks of the river, and who are all infeft in their lands, either '*cum piscationibus*,' or with 'parts and pertinents,' instituted an action of declarator against Sir James; in which they set forth, 'That they and their authors had, by virtue of their titles to the lands, been in the immemorial practice of catching trouts with nets and rods in the river *ex adverso* of their respective properties; and concluded, that they had a right so to fish, or 'in such other manner as to them might seem proper; and that he ought to be prohibited from the exercise of trout-fishings *ex adverso* of their lands.'

The right of trout-fishing understood to be conveyed under the description of part and pertinent, but may be expressly reserved from the grant, or transferred to a third party.

Pleaded for the defender; Trout fishings are not more *res nullius*, or less capable of appropriation, than salmon-fishings, which, from their superior value, have been ranked *inter regalia*; Craig, lib. 1. dieg. 16. § 11.; Stair, b. 2. tit. 3. § 69. The defender's title-deeds shew, that he is vested with the property of those in question.

No 25.

Answered; The defender's exclusive right to salmon-fishing is admitted. But, long before the Crown conferred that right, the pursuers authors had acquired their lands, and the trout-fishing as pertinent of these; for in no instance was the fishing of trout ever reserved by the Crown. It could not, then, bestow that right on the defender. Nor is the vague expression of 'other fishings,' sufficient to indicate such an intention.

The COURT seemed unanimous in the opinion, that the right of trout-fishing in a river, though naturally inherent in the property of the adjacent banks, so as to accompany lands as part and pertinent, might yet be reserved from the grant, or transferred to a third party, either expressly or by prescription; and that trouts were *res nullius* in this sense only, that any person standing on a high road or any public ground contiguous to the stream, might lawfully catch them.

Some of the Judges thought the clause 'other fishings' in the defender's charters sufficiently expressive of the exclusive right of fishing trout on the banks in question; which others *did not admit*; but all seemed agreed, that if he or his authors had that exclusive right, it had been lost by disuse.

The cause was reported upon informations; when the Lords pronounced this interlocutor:

'In respect that Sir James Colquhoun's right to the salmon-fishing is not disputed in this cause, find he has right to the salmon fishing in the river Leven, where it runs through the property of the pursuers; find the pursuers have a right to fish trouts opposite to their respective properties, with trout-rods or hand-nets, but not with net and coble, or in any other way that may be prejudicial to the salmon-fishing belonging to Sir James Colquhoun, the defender.'

Reporter, Lord Braxfield.

Act. Dean of Faculty at Morthland.

Alt. Solicitor-General at Buillie.

Clerk, Home.

S.

Fol. Dic. v. 4. p. 40. Fac. Col. No 5. p. 10.

1795. June 2. ARCHIBALD CAMPBELL against COLIN CAMPBELL.

No 26.

A tenant found not entitled to cut sea-ware for the manufacture of kelp, although the lease, gave him the lands, with 'parts, pendicles, and universal per-

COLIN CAMPBELL possessed on a lease, which commenced in 1759, one half of the farm of Nether Kames, on the coast of Argyleshire, with the 'houses, 'biggings, yards, orchards, mosses, muirs, meadows, grassings, sheelings, parts, 'pendicles, and universal pertinents thereof, used and wont.'

Archibald Campbell purchased this farm in 1786. He soon after complained to the Sheriff, that his tenant pretended to a right to cut sea-ware for the manufacture of kelp, and therefore he craved an interdict against his doing so in future.

The Sheriff granted the interdict, in respect, that 'making the kelp, and cutting the shores, do not fall to be considered as part and pertinent of a farm.'

Two bills of advocation having been refused, the tenant presented a reclaiming petition, which was (2d December 1794) refused without answers.

In a second petition, which was appointed to be answered, the tenant offered to prove, that he and his father had been accustomed to manufacture kelp ever since the commencement of the lease; and that such likewise, though not to the same extent, had been the practice of their predecessor in the farm.

In the answers, the landlord denied the extent of the practice, which, he *alleged*, had been often interrupted.

The tenant, in point of law,

Pleaded; Wherever a farm, situated on the sea-shore, (which, in so far as it is not necessary for purposes of public utility, is *juris privati*; Stair, b. 2. t. 1. § 5.; Ersk. b. 2. t. 6. § 17.), is let to a tenant merely by the name by which it is generally known in the country, without mentioning the number of acres it contains, or specifying its boundaries, it will be held to include the landlord's right in the shores. If the sea should recede, the tenant will be entitled to cultivate and bank the ground which is left by it; and, for the same reason, he is entitled to those vegetable substances which are produced on the surface of the shore.

The tenant, in the present case, has not been opposed in cutting the sea-ware for the purpose of manuring his farm and feeding his cattle. Since, therefore, it is included in the lease for one purpose, it must be so for every other to which it can be put, *salva rei substantia*; and this holds with regard to the manufacture of kelp, as the sea-ware may be cut for that purpose every third year, and even grows the more luxuriantly for being so.

Independently of the general question, as the farm is let with the 'parts, pendicles, and universal pertinents, used and wont,' it must be relevant to prove, from the practice of its possessors, that the cutting of sea-ware, for the manufacture of kelp, is included under that description.

Answered; The right of a tenant extends only to the annual fruits of the surface; Ersk. b. 2. t. 6. § 22. On that account he has no right to mines or minerals, (Stair, 15th February 1668, Colquhoun, *voce* TACK) even for the purpose of manuring his farm, 10th February 1778, Bethune against Jarvis, *IBIDEM*; nor to the woods which grow upon it; and, for the very same reason, he has no right to sea-ware, which must be of several years growth before it is fit to be manufactured into kelp; 14th November 1781, Lord Reay against Falconer, No 33. p. 5151. And although it has not hitherto been thought worth while to object to the tenant's cutting sea-ware for other purposes, his doing so is by no means admitted as a matter of right.

Even if the lease had given an express right to sea ware, it would only have extended to a right of cutting it for the proper uses of the farm, in the same

No 26.

tinents thereof, used and wont; and although a proof was offered, that he and the former tenant had been accustomed to manufacture kelp.

No 26.

manner as it has been found in the case of an express right to cut timber; Gilmour, 16th June 1664, Touch against Ferguson, *voce* Tack.

A subject which is thus of a different nature from those usually included in a lease of land, and different also from those which are expressly conveyed, cannot be understood to come under the description of a pertinent; and the proof offered, especially in a question with the pursuer, who is a singular successor, is irrelevant; Ersk. b. 2. t. 6. § 24.

Upon advising the petition, with answers, the Court had no doubt, that, in the general case, a right of manufacturing kelp could not be enjoyed as part and pertinent of a farm; but several of the Judges thought, that the proof offered should be allowed before answer.

THE LORDS adhered;—see Tack.

Lord Ordinary, <i>Ankerville.</i>	Act. <i>M. Ross.</i>	Alt. <i>Hops.</i>	Clerk, <i>Sinclair.</i>
<i>D. D.</i>	<i>Fol. Dic. v. 4. p. 40.</i>	<i>Fac. Col. No 171. p. 403.</i>	

If a mill will be carried as part and pertinent; see MILL.

See Tack.

APPENDIX.

PART I.

PART AND PERTINENT.

1777. June 17. WILLIAM ROSE against JOHN RAMSAY.

No. 1.

AT Michaelmas Head Court, for the county of Banff, held 29th September 1775, John Ramsay, Esq; advocate, younger of Banff, claimed to be enrolled as a freeholder in that county, as having right to the liferent superiority of the lands of Sandley, &c. rated in the cess-books at L. 500 Scots. To this claim, an objection was made in name of William Rose of Ballivat, one of the freeholders, upon this ground, That Mr Ramsay had not right to the whole subjects, composing the *cumulo* of L. 500, the valued rent, there being a mill upon the lands of Sandley, not contained in his title. To this objection it was answered, That the mill of Sandley must pass as part and pertinent of the said lands, the petitioner having an undoubted title to the whole subjects composing the foresaid *cumulo*. The freeholders sustained the objection, and the cause was brought before the Court of Session, by a petition and complaint for Mr Ramsay.

Mills carried by a disposition of the lands with parts and pertinents. See No. 24. p. 9645.

For Mr Ramsay, it was argued, That though a mill may, by disposition, be made a separate tenement, yet where a proprietor builds a mill upon his own land, and grants a disposition of the whole of these lands, the mill in that case, without being particularly specified, is carried by that disposition along with the lands. Mills thus, though capable of being made *separata tenementa*, and though frequently put into that situation, yet where they never have entered into the title-deeds of the proprietor, nor have been the subject of a particular investiture or separate infeftment, are understood to pass as parts and pertinents of the lands, in the same way with any other building. The authority of Mr Erskine, B. 2. Tit. 6. § 5. was resorted to, to prove that mills are not of themselves to be considered as separate tenements from lands, unless expressly made so; and, in the present case, the mill of Sandley never having been mentioned in any of the former title-deeds, must be

- No. 1. carried as part and pertinent by the complainer's infestment in the lands themselves. It would indeed be somewhat extraordinary, if Lord Banff, after disposing the lands of Sandley to the complainer, precisely in terms of his own titles, should yet be understood to have retained the property of the mill, to which he could have no right, except upon the footing of these titles, conceived in the very same terms with the complainer's disposition.

On the part of Mr Rose and the freeholders, it was argued, from the authority of Lord Stair, B. 2. Tit. 3. § 71. ; and Lord Bankton, B. 2. Tit. 3. § 94., That mills cannot be carried as part and pertinent, being esteemed *separata tenementa*, and requiring a special sasine, unless the lands be *in baronia*. Mill-rents, as well as land-rents, were taken under consideration by the commissioners in making out the valuations of the different counties in Scotland ; and with regard to this very county of Banff, this is proved by the state or roll of the rents made out by the commissioners appointed by the act 1649, (to be found in the Register), in which mill-rents are particularly stated. The act of convention 1643, likewise specially directed the commissioners to take up all sorts of rents together, without restriction or limitation. And accordingly, in many valuation-rolls of the different counties of Scotland, mills are comprehended under the different *cumulo* articles therein stated. Mills, therefore, being thus entitled to a proportion of the valued rent, being *separata tenementa*, and not passing as part and pertinent, the complaint, it was argued, fell to be dismissed, and the judgment of the freeholders affirmed.

It was observed from the Bench : That this was not so much a question, whether mills are a subject of valuation, as whether they can pass by a general disposition of the lands. It is true, in general, that a mill is a separate tenement, and requires a separate sasine and distinct symbol, even when specially disposed. But still most cases of this kind are *questiones voluntatis* ; and if it appeared to have been the intention of the disposer, to convey the mills along with the lands, provided they had not been established as separate and distinct tenements before, this general disposition will be effectual to carry them as part and pertinent. It was also observed from the Bench, by one of the Judges, with regard to the valuation of mills, that he had lighted upon a passage in the Rhymer's *Fœdera*, which proves that mills were extended in the reign of Alexander III. The Court reversed the judgment of the Freeholders, and found, That mills could be carried by a disposition of the lands with parts and pertinents.

For the Complainer, *Geo. Abercrombie, Blair*. For Mr Rose, *Alex. Murray, Edphinstone*.
J. IV.

PASSIVE TITLE.

DIVISION I.

Behaviour as Heir.

SECT. I.

Relates only to the Apparent Heir.

1618. June 11. HALIBURTON *against* LORD BALMERINOCHE.

No 17

IN an action betwixt Haliburton and my Lord Balmerinoch, the LORDS found the Lord Balmerinoch could not be convened as successor to his father, because he was forfault, and the gratuitous restitution made him capable of rights disposed, but could not make him heir to any but to the Prince.

Kerse, MS. fol. 142.

1626. December 21. IRVINE *against* L. MONYMSK.

No 23

IN an action pursued by Irvine *contra* L. Monymusk, who was convened to pay a debt owing by his father, as behaving himself as heir to him; in this manner qualified, viz. in so far as; the pursuer offered to prove, that Monymusk had sold a tenement of land since the decease of his father, in the which land his father had died last infest and seised; which qualification was repelled, in respect of this exception proponed, viz. that the defender, the time when he sold this land, had then an elder brother living, so that, *per rerum naturam*, he could not then have been heir to his father, and so that deed could not make him to be heir, there being another then living who would have been heir. This

Behaviour not inferred from a second son selling land belonging to his father, tho' his eldest brother was an idiot declared, and he was his curator, and had got the price,

No 2.
and his elder
brother died
before the
commence-
ment of the
process.

exception was admitted to elide the said qualification, notwithstanding it was *replied*, That the elder brother was an idiot declared, and that the defender was his curator; and that he had succeeded to him, and that he was now deceased, so that the appearance of that succession by the elder brother had evanished; and also, that it was *answered*, That the defender had received the price of the land sold by him, and had the same yet in his hands; which all was repelled, and the exception sustained; for the Lords thought, that that land sold by the defender might yet be sought to be adjudged to the pursuer for satisfying of the defunct's debt libelled, notwithstanding of the alienation thereof by the defender, seeing the defunct died *vest* therein, and the defender has qualified no right in his person thereto *unde*

Act. Baird.

Ab. Lamentab

Clerk, Hay.

Ed. Dic. v. 2. p. 26. Durie, p. 252.

1665. January 12.

WALLACE against WALLACE.

No 3.
What import-
ed by the
terms (heirs
or bairns,) as
regarding
liability.

WILLIAM WALLACE, only son and bairn, of the first marriage, procreated betwixt William Wallace his father and his mother, pursues Hugh Wallace, his brother of the second marriage, as executor confirmed to their father, for employing of 5000 merks, which their father received in tocher with his mother, and was obliged, by their contract of marriage, to employ in favours of himself and his wife, and the heirs or bairns to be procreated betwixt them. Compears Margaret Kennedy the second wife, in whose favours the defunct is obliged to employ a sum of money, and to perform certain other obligations contained in her contract of marriage, and *alleges*, That no process can be sustained at the pursuer's instance, as bairn, unless he were heir served; and, in that case, he would be obliged to fulfil the second contract of marriage, and be also liable to his father's debt. Likewise, that clause conceived in the pursuer's favours can be interpreted no other ways, than it would have been if his father had employed the sum in his own time, conform to the destination thereof; now, if he had employed the same, by infestment or otherways, in favours of himself and wife, and the heirs or bairns of the marriage, he himself would have been fiar, and the pursuer behoved to have been served heir of the marriage thereto, and consequently liable *ut supra*. It was *answered*, That the obligation being conceived in favours of the heirs or bairns, it is equivalent as if the word bairns had only been set down; and it is conceived the word bairns is exegetic of the word heirs, and imports no necessary part of a service or retour; for, if there had been more sons of the marriage than one, all of them would not have been heirs, and yet the obligation is in all their favours; and there is a great difference betwixt a personal obligation in these terms, and an employment by an infestment; for, where there is an infestment, there is a real right,

to which some must be served heir in special for transmitting the infeftment in the heir's person, either as heir of line, or heir of tailzie and provision; but, in this case, there is no necessity of a service or retour, being only a personal obligation in favours of the heir or bairn, which the heir or bairn may pursue without a service.

THE LORDS sustained the process at the instance of the bairn as bairn, reserving consideration, in its own due place, how far the pursuer might be liable to creditors; and, in the mean time, found, that the relict should be preferred to the pursuer, as to the liferent of any thing provided to her in liferent, by contract of marriage, but not what she might claim of the moveables *jure relictæ*.

Gilmour, No 126. p. 91.

1682. November 28.

EARL OF MIDDLETON against Sir JAMES STANFIELD.

IN the suspension pursued by the Earl of Middleton against Sir James Stanfield, of a decret recovered at Sir James's instance against the Earl, as lawfully charged to enter heir to his father, the Earl having *alleged*, That the time of the pronouncing of the decret he was absent *reipublicæ causa*, being Ambassador for the King to the Emperor, and that he produced now a renunciation; it was *replied* for Sir James, That he could not renounce; because he had behaved as heir, by granting a factory to William Cooper, for uplifting the rents of his father's estate the year 1674, and bygones preceding his father's death; and that, accordingly, his factor had uplifted and counted with him, and remitted several sums of money to him by bills. It was *duplied* for the Earl, That the factory produced, being dated in December 1674, his father having deceased before Whitsunday that year, it was only in general terms to uplift the rents of the defender's estate in Scotland, and that the defender had an estate, properly belonging to himself, before his father's decease, *viz.* the lands of Graslie, to which the factory might be applicable: Likeas, the defender could not behave as heir, by granting a factory for uplifting the rents of his father's estate, whereto it was impossible he could have right, as heir of line, seeing his father, in his own time, did resign his whole estate in Scotland, in favour of his second Lady in liferent, and the children of the marriage in fee; whereupon there was a public infeftment, wherethrough the Lady had right to the mails and duties, after her husband's death: Likeas, he had a tack from the Lady, which did commence from the deceased Earl's death: And albeit the same was after the factory, yet seeing the factory before that tack could not be effectual, the granting thereof could not infer a behaviour as heir.—THE LORDS found that allegiance relevant for the Earl, that his father's whole estate was provided in favour of the Lady, and the heirs of that second mar-

No 4.

An apparent heir was not subjected to the passive title of behaviour, by granting a factory to one to uplift rents of lands, when his father's whole estate was provided to a liferenter, and to the children of a second marriage.

No 4.

riage, relevant against the passive titles of behaviour as heir, and allowed him to renounce.

Fol. Dic. v. 2. p. 26. P. Falconer, No 33. p. 17.

* * * Harcarse reports this case.

THE Earl of Middleton, Lord Secretary, being pursued for his father's debts, as *se gerens pro hærede*, in so far as, immediately after his father's decease, he renewed a factory to William Couper, his father's factor, for uplifting the rents of his lands in Scotland, whom he counted with for these rents of several years preceding and subsequent to his father's death, and got money remitted to him out of them by bills of exchange.

Alleged for the defender, That the factory cannot infer a passive title, seeing it is not special as to any of his father's lands, but general as to his own lands, and the defender had a piece of land to which it was applicable; *2do, Esto*, the factor had counted for and paid to him rents due before the father's death, that could not import *gestionem pro hærede*, seeing these fell under executry; nor yet vitious intromission, there being an executor confirmed before commencing of his process; and any intromission with rents of years after the father's decease, could as little infer behaviour as heir, because the fee of the lands was provided to the children of the second marriage, who were infeft therein; so that the defender, as heir general, had neither right thereto, nor could have *animus adeundi*.

THE LORDS sustained the defender's several allegiances relevant to assoilzie from the passive titles.

Harcarse, (AIRES GESTIO, &c.) No 36. p. 8.

* * * Fountainhall also reports this case.

SIR JAMES STAMFIELD of Newmilns *contra* the Earl of Middleton, now one of the Secretaries; "THE LORDS, upon Forret's report, found it no passive title against Middleton to cause him pay his father's debt, that he had granted a factory to William Couper, his father's old chamberlain, to uplift the rents; and that two years after his father's death he had counted with him and given him a discharge; which they found no gestion; because he stood infeft in some lands before Sir James's debt, and the factory was general, without condescending, and so might be applied to these lands; and that he had a right to intromit from his mother-in-law, who was liferentrix of the lands, and stood infeft in L. 10,000 Sterling for the behoof of her children; which was sufficient to palliate, cloak, and purge his intromissions, and make him only accountable to her."

Fountainhall, v. 1. p. 197.

* * * This case is also reported by Sir Patrick Home.

No 4.

1682. *December*.—SIR JAMES STAMPFIELD having obtained a decret against the Earl of Middleton, as representing his father upon the passive titles, for payment of a debt assigned to him by Lindsay, merchant in London; and the Earl having raised suspension and reduction, and being reponed against the decret upon that ground, that he was absent *reipublicæ causa* the time of the obtaining of the decret, he being then at Vienna as Ambassador from the King to the Emperor, and that he was content to renounce to be heir to his father, and gave in a renunciation;—*answered* for the pursuer, That the Earl could not be free by granting of a renunciation, because he behaved himself as heir to his father, in so far as he did grant a factory in the year 1674, immediately after his father's decease, to William Couper, who was formerly chamberlain to his father, for uplifting of the rents of the lands; and, accordingly, he counted with the factor for the rents of the lands, both for years preceding and after his father's decease. *Replied*, That the granting of the factory could not infer a passive title, because it was only a general factory for intromitting with rents of his lands, and annualrents of sums of money due to him; so that he having both lands and sums of money due to him in Scotland, beside those that belonged to his father, *viz.* the lands of Loresslie, acquired from the Earl of Strathmore, and several sums of money due by Sir James M'Donald to the Earl himself; so that the factory can only be understood of the rents and annualrents of these lands, and sums of money, and not of rents of lands or sums of money belonging to his father; especially seeing all the lands in Scotland belonging to his father were liferented by his mother-in-law, and any intromissions he had with the rents of these lands, was by virtue of a tack from his mother-in-law, for which he paid her a considerable tack-duty; and albeit the factor did count to the Earl for the rents of the lands belonging to his father, yet that cannot infer the passive title of vitious intromission against him, because there was an executor confirmed, *viz.* the said William Couper, before the intenting of this process, which is always relevant to purge vitious intromission, seeing the Earl is countable to the executor. *Duplied*, That, albeit the right of the lands of Loresslie be taken in the Earl's name, yet it appears, by William Couper's accounts, that there was a part of the price paid out of the rents of the lands that belonged to his father; and it appears likewise, by the accounts, that the factor sent several sums of money to the Earl, by bills of exchange, and the Earl did count yearly with the factor, and stated the balance that was due, even for the rents of these lands that belonged to his father, before he had the right to the tack from his mother-in-law. *Triplied*, That, albeit there was a part of these lands belonging to the Earl's father employed for payment of the price of a part of the

- No 4. lands of Loresslie, seeing there was an executor confirmed; and albeit the Earl received several sums of money from the factor, upon bills of exchange, before he got the tack from his mother-in-law, yet these sums can only be ascribed to the rents of the lands of Loresslie, and other sums of money belonging to the Earl himself, especially seeing the sums contained in these bills, preceding his right from his mother-in-law, do not exceed the rents of his own lands, and the annual rents of the sums of money that belong to himself, and the stating the accounts with the factor cannot infer a behaviour as heir, not only for the reasons above mentioned, but also for this reason, that, albeit there be a balance stated as due to the Earl, yet he never received it, but it is yet resting; so that behaviour as heir being *majus animi quam facti*, it cannot be understood that the Earl designed to behave as heir, seeing he has not reaped any advantage of any rents of the lands belonging to his father, but which he had right to from his mother-in-law.—THE LORDS found, that the late Earl being denuded of his estate, in favour of his Lady, from whom this Earl hath a tack, and that the factory given to William Couper being general, it could not infer particular behaviour; and that the vitious intromission was taken off by the confirmation of an executor, before the intenting of this cause.

Sir Pat. Home, MS. v. I. No 290. p. 431.

S E C T. II.

Intromission with the Predecessor's Rents is a Behaviour. What understood to be the Predecessor's Rents.

1628. March 22.

FARQUHAR against CAMPBELL.

No 5.

INTROMISSION by an apparent heir with the rents of a subject, whereof his father died in possession, found not to infer behaviour, it being afterwards understood, that the defunct had no right to the subject, but a third party, to whom the apparent heir behoved to account for his intromissions; and, therefore, the creditors were not prejudged by the apparent heir's intromission with a subject which did not belong to their debtor.

Fol. Dic. v. 2. p. 27. Durie.

* * * This case is No 152. p. 9022. *voce* MINOR.

1662. June 19.

ISOBEL DRUMMOND *against* JEAN SKEEN.

No 6.

ISOBEL DRUMMOND pursues Jean Skeen, as behaving herself as heir to her brother James Skeen, by uplifting the mails of the lands, wherein he died infest, to fulfil her contract of marriage with James. The defender *alleged*, Absolvitor; because she uplifted those duties by virtue of her infestment, being served heir to John Skeen, son to James Skeen, the pursuer's debtor, who was infest, not as heir to his father James, but as heir to her goodsire. The pursuer *answered*, In respect to the defender's sasine, or to John Skeen's, which were evidently null, seeing James Skeen was infest, and so John could not pass over him to his goodsire; and if any regard were had to such infestment, it would open a door to all fraud, and abstracting of defunct's creditor's evidents.

THE LORDS found the defence relevant to purge this vitious passive title, seeing the failzie was not in this defender, but in John Skeen, his brother's son, but prejudice to reduce as accords; but ordained her to renounce to be heir to James, that adjudications might be obtained.

Stair, v. I. p. 111.

1663. February 21.

HARY HAMILTON *against* WILLIAM HAMILTON.

No 7.

HARY HAMILTON pursues his brother William, as behaving himself as heir to their father, John Hamilton, apothecary, to pay 6000 merks of provision by bond, and condescends that William intromitted with the rents of the lands of Ulistobe, whereunto his father had heritable right. The defender *answered*, That his father was not infest; because he infest the defender therein before his death, reserving only his own liferent. The pursuer *answered*, That the infestment was under reversion, and was redeemed by the father, which order, though not declared, gave him the right to this land, and was more than equivalent to an heritable disposition, clad with possession, which would make the apparent heir's intromitting infer behaving as heir, for the declarator *non constituit sed declarat jus constitutum*.

THE LORDS repelled the defence and duply, in respect of the condescendence, and reply of the order used.

2dly, The defender *alleged*, Absolvitor; because those lands were appraised from the defunct, and thereby he was denuded; and so the defender could not be heir therein, at least he could have nothing but the right of reversion, which reacheth not to mails and duties.

THE LORDS found, that, unless the defender had title, or tolerance from the appriser, the legal not being expired, but the debtor in possession, his heir in.

An apparent heir intromitting with the rents of lands, which had been wadset by the defunct, but which were redeemed by him, and in his possession at his death, though there was no declarator of redemption, was found to infer behaviour. It was also found behaviour, that the apparent heir intromitted with rents of lands appraised from the defunct, but of which the legal was not expired.

- No 7. tromitting, behaved as heir, the apprising being but a security, of which the appriser might make no use, or but in part, as he pleased.

Fol. Dic. v. 2. p. 27. Stair, v. 1. p. 185.

1663. February 21.

STIRLING against CAMPBELL.

No 8.

THE same last point was found betwixt these parties, and also that the heir's intromission with the whole silver-work, so comprehending the best of them, which is the heirship, was *gestio pro hærede*.

Fol. Dic. v. 2. p. 27. Stair, v. 1. p. 185.

1667. January 16.

REID against SALMOND.

No 9.

REID pursues Barbara Salmond and James Telzifer, her husband, for a debt due by her father, as behaving herself as heir, by possessing a house wherein her father died infeft, and by setting another house of his to tenants. It was *answered*, That James Telzifer was tenant in the house possessed by him, before the defunct's death, and might possess, *per tacitam relocationem*; neither could he safely leave the house, till he had given it over to some having right.

Which the Lords found relevant.

2dly, It was *alleged*, That the defunct had disposed the same tenement to the defender's son, his oye, which disposition, albeit it attained not infeftment, yet it was a sufficient title for mails and duties, and to continue possession, and to purge the vitious title of behaving as heir.

Which the Lords found also relevant.

Stair, v. 1. p. 427.

1671. July 11.

MAXWELL against MAXWELL.

No 10.

WHERE the appriser was infeft and in possession, and the defunct not in possession, the apparent heir's intromission with the rents was found not *gestio pro hærede*.

Fol. Dic. v. 2. p. 27. Stair.

*** This case is No 50. p. 5306. *voce* HEIR APPARENT.

1684. *January.*GIBSON *against* GRANT of Rothiesmains.

No 11.

A party's intromission with the rents of lands, in which his father died infest and in possession, found to infer a behaviour as heir against him, though the father, at his decease, was denuded by expired apprisings.

ROBERT GIBSON of Linkwood having pursued Grant of Rothiesmains for payment of a sum contained in his father's bond, as behaving himself as heir to his father, by intromission with the mails and duties of the lands, wherein his father died infest; *alleged* for the defender, That he could not be liable upon that passive title, because his father was denuded by expired apprisings, long before his decease, and the defender countable to the comprisers for any intromission he had with the rents. *Answered*, That the defender's father having continued in the possession of the lands during his lifetime, notwithstanding of the expired apprisings; and he having continued his father's possession; it must infer a behaviour as heir against him, unless he had obtained a right or warrant from the comprisers to intromit before his intromission. THE LORDS repelled the defences, and found the defender's intromission with the rents of the lands, wherein his father died infest and in possession, did infer a behaviour as heir against him, unless he had intromitted by a warrant or right from the comprisers.

Fol. Dic. v. 2. p. 27. Sir Patrick Home, MS. v. 1. No 549.

S E C T. III.

Intromission with the Heirship Moveables.

1607. *July 9.*GRANGER *against* GRANGER.

No 12.

GRANGER pursues his brother Granger, as heir to his father, at the least as having behaved himself as heir to his father, by intromission with his heirship goods, to possess him in his tack, and to warrant him. It was *excepted*, That their defunct father dying at the horn, his escheat was taken, and declarator obtained thereupon, and this defender obtained right from the donatar. It was *replied*, That, before the gift of escheat and declarator, this defender being apparent heir, had intromitted with the heirship. It was *answered*, That the goods being the donatar's gear by the rebellion, albeit he had intromitted, yet he was debtor to the donatar, and so could not pertain to him as heir. Therefore, repelled the exception, in respect of the reply.

Fol. Dic. v. 2. p. 28. Haddington, MS. No 1395.

No 13.

1610. March 8.

BAILLIE against HOME.

A MAN found to be heir to his father, by intromission with his table, standing-bed, and almerie; albeit he *alleged*, That they were in the house, whereof he was heir, in his father's lifetime; because he should have entered to the possession by the Sheriff, with inventory of the gear, being therein to be made furthcoming to all parties having interest, seeing he intended not to be heir.

Fol. Dic. v. 2. p. 27. Haddington, MS. No 1853.

No 14.

1618. February 7.

FALSIDE against NAPIER.

IN an action of reduction *ex capite inhibitionis* by Falside against Napier, Lady Ogilvy, the LORDS found, that in respect James Lord Ogilvy had immediately after his father's decease purchased ——— by deliverance of the LORDS for taking inventory of the hail goods and gear pertaining to his umquhile father, conform to the which, inventory was taken by the Sheriff; that therefore he could not be convened as heir for intromitting with any of his heirship goods and gear pertaining to him; and when it was duplied, that they offered them to prove, that he meddled with certain heirships not expressed in the inventory, the LORDS found that could not be had, in respect of the inventory taken, *et quia abfuit animus gerendi pro hærede.*

Fol. Dic. v. 2. p. 28. Kerse MS. fol. 138.

1622. November 6. L. DUNDAS against ——— HAMILTON.

No 15.

In a suit upon the passive titles, where the intromission was with trifling articles, and the claim laid on a decree of spuilzie 36 years old, the intromission probable only *scripto vel juramento.*

THE deceased L. of Dundas obtained decret against umquhile ——— Hamilton of Peill, for spuilziation of teinds; which decret being desired to be transferred, at the instance of Sir James Dundas, executor to his father, obtainer of the sentence, against the oye of the said umquhile Hamilton, against whom the spuilzie was decerned, as heir by progress to him qualified in the following manner, viz. in so far as the pursuer offered to prove, that the oye defender was heir to his umquhile father, which father was heir to his father, who was decerned in the spuilzie, at the least, he behaved himself as heir to him, in so far as that after the decease of his said father, who was decerned, he had intromitted with his father's heirship goods underwritten, in manner after qualified, viz. that by the space of four years, or thereby, after his father's decease, he had entered, and dwelt in the house of Peill of Livingston, pertaining to his father, where there being then within that house, his umquhile father's best board and standing bed, with a brewing cauldron, he used the same by eating at the board, lying in the bed, and brewing in the cauldron; likeas, he

delivered a great pot, which was the best pot, to a flesher, for satisfaction of some flesh, furnished to himself, after the decease of his father; as also having sold the house and lands of the Peell to the Earl of Linlithgow, he delivered, and freely gifted the said board and bed to the Earl of Linlithgow, which was a disposition and intromission sufficient of the law to make him heir to his father, and consequently to make the defender, his son, who is served heir to his father, heir also, by progress to the goodsire, his father having intromitted with and disposed upon the heirship goods foresaid, as said is. THE LORDS found not the foresaid qualification relevant, concerning the defender's father's using of the board, bed, and cauldron, to make the defender, or his father, heir to the goodsire; and as to that part of the qualification anent the gifting of the said bed and board, and delivering the pot to the flesher, the LORDS also found it not relevant to make him heir, except the pursuer would prove, that the same was gifted by writ, because the particulars foresaid, so intromitted with, and disposed, were but matters of small importance, and not of such consequence, whereby the defender should be found heir to his goodsire. In which decision, the LORDS were also moved by consideration, that the sentence desired to be transferred was recovered about 36 years since, and that it was never executed against the goodsire, against whom it was recovered in his own time, nor against his son in his lifetime, but only now craved against the oye, who was not born the time of the sentence; and sicklike, that the goodsire's wife lived after the goodsire's decease, and kept the possession of the alledged heirship goods four or five years after her husband's decease, before ever the son intromitted.

Act. Aiton & Oliphant.

Alt. Burnet.

Clerk, Gibson.

Durie, p. 33.

*** Spottiswood reports this case.

1622. November 7.—A decret of spuilzie being sought to be transferred against one as behaving himself as heir to his father by intromission with a cauldron, in so far as he gifted the same after his decease; it was found, That it could not be proved but by writ or oath of party, because it would bring upon the defender the profits of a spuilzie for many years.

Spottiswood, (EJECTION and SPOILIATION.) p. 87.

1626. July 14.

JOHNSTON against MASON.

No 16.

GILBERT JOHNSTON, and Mason, his spouse, convene Mason, as behaving himself as heir to his umquhile father by intromission with his heirship goods, to

Found in conformity with
Bailie a.

No 16.

against Heme,
No 13. p.
9638.

In this case,
the apparent
heir continu-
ed in posses-
sion of the
heirship for
two years
without mak-
ing inven-
tory.

make payment of a sum of money promitted to them by his father in tocher; in the which cause, the defender *alleged*, that he could not be convened *hoc nomine*, as intromitter with the said heirship goods, to make him heir, because he being infest by his umquhile father in a tenement of land, before the contract of marriage libelled, after the decease of his father, he removed the relict and entered to the possession of that tenement, within the which the said heirship goods were then standing for the time; and which he could not cast out, but suffered the same to remain in the house, where they are yet extant, to be forthcoming to the pursuer, or any other having interest in the same; and except he had sold and disponed thereupon, or had made some other use of them, than by retaining of the same in the house, he cannot be therefore convened, as thereby behaving himself to be heir. This allegiance was repelled, and the retaining of the possession of the said goods, and using of the same, by eating on the boards, and lying on the beds, was found sufficient; neither was it found necessary, that the pursuer should reply upon the defender's selling or disposing of the heirship, seeing his retaining thereof, and using of the same, as said is, was found enough; for if he had pleased to evite the danger of being heir, he had his ordinary remeed to have meaned himself to the LORDS, and to have obtained a warrant to make inventory of the goods within the dwelling-house foresaid, before he had entered thereto, to have been forthcoming to all parties; which not being done, he has prejudged himself, especially seeing it was offered to be proved by the pursuer, that there are two years past since his father's decease, during the which whole space, he has retained the possession of the said goods.

Clerk, Gibson.

Fol. Dic. v. 2. p. 27. Durie, p. 218.

1626. July 14.

SMITH against GRAY.

No 17.

A son confirmed executor, creditor to his father after intending action against him as intromitter was assailed.

THOMAS SMITH pursues John Gray as intromitter with his umquhile father's goods and gear, to make payment to him of a sum addebted to him by his said umquhile father. In the which action, this exception was found relevant to assailzie the defender, in so far as he was convened as intromitter, viz. that the defender alleged, that he himself was executor confirmed to his umquhile father, and so had *beneficium inventarii*, and could not be further convened as intromitter; likeas, he was confirmed executor, as a creditor of his father's; for he being cautioner for him to sundry persons, he had paid to them their debts, wherein he was cautioner for his father, and had taken assignation from them to their bonds, and for relief of his cautionry he was confirmed executor.—

Which exception was found relevant, albeit the pursuer replied, that the confirmation was done *post hanc litem ceptam*, and after he was summoned, and after the day of compareance therein, and also that he had intromitted with his father's goods before the confirmation; which preceding intromission could not be purged by the subsequent confirmation, to exclude the action which arose to the creditor thereby before that confirmation, and he was *in mala fide* to do the same in prejudice of this creditor. Which reply was repelled, and the exception sustained, seeing the confirmation, albeit after the intenting of the cause, was within less than a year after the defunct's decease.

The same was found before in this same session betwixt the relict of Robert Dawling and James Hume, where the LORDS found no process against James Hume as intromitter, the bairns of the defunct being confirmed executors to him within year and day, albeit after the intenting of the cause.

Act. ———.

Alt. *Mowat.**Durie, p. 216.*

1627. July 17.

FRASER against L. MONIMUSK.

No 18.

JOHN FRASER having convened the Laird of Monimusk for payment to him of a debt of his father's, unto whom he was heir, at least had behaved himself as heir, by intromitting such sundry heirship goods and gear, viz. a silver bason and laver, napery, &c.; *excepted*, That what intromission he had, was by virtue that he was curator to his eldest brother, who was idiot and heir to his father, which intromission was necessary. *Replied*, That since his brother's decease, he had used these goods. Albeit some were moved, because the beginning of his possession was not vitious, yet it was found in using them he had behaved himself as heir.

Spottiswood, (HEIR and HEIRSHIPS.) p. 136.

*** Durie reports this case.

In an action at the instance of one Fraser against the L. of Monimusk, for payment of 500 merks contained in his umquhile father's bond, for the which the defender was convened as behaving himself as heir to his umquhile brother, which brother was served heir to their father, who was debtor by intromission with his brother's heirship goods, and the pursuer having specially condescended upon the quantity of the goods so intromitted with by the defender, and upon the manner of his intromission and quality of the deeds done by him to make him heir thereby, viz. that he, after the defunct's decease, retained the possession of the best bason, and silver spoons, and timber-beds and boards, which after his said brother's decease, who died five years since, all

No 18.

this time since he hath used in his house at ordinary times of eating, as he would have used if the same had been properly his own; and the defender alleging that that qualification of using was not enough, except that he could allege that he had disposed upon these particulars, seeing they were not the worse of that manner of using condescended on, specially seeing the first time of the defender's intromission ought to be respected, at which time his brother, to whom he is convened as heir, was then living, who being declared idiot, and he served tutor to him, his intromission then as tutor, albeit he retained the possession since his decease, being of such goods which he could not cast out of his house, and so in effect the intromission was necessary, and the same not being deteriorate, and which he offered to make forthcoming as good as they were the time of the defunct's decease, therefore he could not thereby be found to be heir: THE LORDS repelled the exception, and found the using of the foresaid particulars at table, viz. the bason and spoons, washing therein, and supping and eating with the spoons, and eating upon the board, and lying in the bed to be a sufficient qualification being proved, to make the defender heir, notwithstanding of the offer to make the same forthcoming as good as they were; and that albeit the first time of his intromission was as tutor as said is, which was repelled by the LORDS, and the foresaid qualification of using and retaining of the possession so long after the defunct's decease was sustained, seeing during that time the defender, if he had intended to have been freed of the danger of being heir, ought to have meant himself to the LORDS, and craved inventory to have been made of the goods, &c. as use is in such cases, which not being done, he hath prejudged himself. Yet *I. G. Cujuscunque rei et negotii initium inspiciendum et causa, non finis.*

Act. Baird.

Alt. Lermontb.

Clerk, Gibson.

Durie, p. 256.

*** Kerse reports this case.

FOUND, That the retention of heirship goods by Monimusk which he concealed while after his father's death as tutor to Duncan Forbes, his eldest brother, and heir to his father, who was served idiot; induced behaving as heir to Duncan, his brother, to whom he was apparent heir, and that *ex hoc solo* because he used the heirship goods after his brother's decease.

Kerse, MS. fol. 139.

*** This case is also reported by Auchinleck.

THE Laird of Monimusk being pursued by one Fraser, as heir to his brother Duncan, who was heir to their father, who was obliged by his bond to the pursuer for a certain sum of money, at least as behaving himself as heir to his brother Duncan by intromission with certain heirship goods and gear pertain-

ing to the said Duncan, and using the said heirship goods after his brother's decease; to which it was *answered*, That the said Duncan being idiot, and the defender his tutor, his intromission was necessary, and he offered to make the goods forthcoming. THE LORDS found the libel relevant, and repelled the exception, in respect the defender made use of the heirship gear after his brother's decease, to whom he was appointed heir.

Auchinleck, MS. p. 1.

1629. February 14.

STEVEN *against* PATERSON.

No 19.

ONE Paterson being convened as heir to his father John Paterson, by intromission with his heirship goods, for payment of a debt of 1000 merks owing by his father, and the defender purging his intromission by warrant of the LORDS granted to the defender, and directed to the Bailies of Edinburgh, to make inventory of the goods being in his father's house; according whereunto inventory was made; the goods contained in the which inventory are extant to be made forthcoming; wherefore he *alleged*, That he could not thereby be convened as he; and the pursuer *replying*, That by and attour the goods contained in the inventory, the defender had intromitted with his father's bible, a musket, a sword, a stand of curtains, and two pillows, which were the best his father had, and which were heirship, which the defender had used, and were not contained in the inventory; these particulars, and this manner of intromission, albeit both the particulars were few and little worth, and also that the defender's intromission was only qualified in using of them, and not in disposing of them or making any advantageous use or benefit thereof, was sustained to make him heir and subject to pay the debt of 1000 merks.

Act. ———.

Alt. *Aiton.*

Clerk, *Hay.*

Fol. Dic. v. 2. p. 28. Durie, p. 426.

* * This case is also reported by Auchinleck:

Feb. 14. & March 13.—ANDREW STEVEN pursues William Paterson as heir to his father, at least successor *titulo lucrativo*, at least intromitter with certain heirship goods and gear for payment of 1000 merks; but by the defender it is *answered* to that part of the alternative concerning heirship goods and gear, that after his father's decease, he obtained a warrant of the Lords to a Bailie and a clerk to take up inventory of the gear within the house, which he is content to make forthcoming. It was *replied* by the pursuer, That he offers him to prove that he intromitted with other particulars condescended upon by and attour the gear contained in the inventory, viz. the best of each sort, and used

No 19.

the same as the other goods, which must infer that he behaved himself as heir. THE LORDS repelled the exception in respect of the reply, 14th February 1629. And the same being again disputed the 13th of March 1629, was sustained again, but agreed by submission.

Auchinleck, MS. p. 2.

1629. July 2.

CUNNINGHAME *against* MOUTRAY.

No 20.

A person intronitted with heirship moveables when he was not apparent heir, but continued in possession after he became apparent heir. Found that he had not behaved as heir.

THE defender being convened to pay his predecessor's debt, as heir to him, by intromission with his heirship goods after his decease; it was found that that intromission could not make him liable to pay the debt as heir, and that he could not be reputed heir thereby; because, at the time of the defunct's decease, at which time it is libelled that the defender intromitted, the defunct had then living, after his decease, a full sister-german, who only might be heir, and not this defender, who was but half-brother to the defunct; so that his intromission could not be as heir, seeing he could not then have been heir; neither was it respected what the pursuer answered, that seeing that sister-german died without any to represent her, and that she was never heir served, and that there is none now nearer to the defunct than the defender, his continuing in the possession of these goods, which were heirship in law to the defunct, must now make him liable *hoc nomine* as heir, seeing there is no other that can be heir. This was repelled and the allegiance sustained, but the process was sustained against him to make such goods as shall be proved to be intronitted with by him forthcoming to the pursuer *in ipsis corporibus*, and no further to be liable.

Act. *Cunninghame & Russel.*

Alt. ———.

Clerk, *Hay.*

Fol. Dic. v. 2. p. 28. Durie, p. 454.

No 21.

The apparent heir found liable, because he had lain in the defunct's bed, drank in his mazer cup, and worn his silk hose, &c.

1630. January 15.

CLEGHORN *against* FAIRLIE.

CLEGHORN, as assignee to a bond of L. 100 made to Katharine Scowler by umquhile James Fairlie, pursues the daughter of the elder brother of the said umquhile James Fairlie, as heir of conquest, and ——— Maxwell her spouse for his interest, and William Fairlie younger brother to the said umquhile James, as heir of line, for registration of the said bond; and the younger brother, heir of line, offering to renounce, the heir of conquest *alleging* that he could not be heard to renounce, because he had intromitted with the heirship goods of the defunct, standing in the house where he died, and remained still in possession of the house, and had lain in his bed and bed-cloaths which were standing in the said house; likeas, he meddled with a mazer which was in the

defunct's possession, and drank therein and used it at his pleasure, and did wear his green silk shanks; this allegiance was sustained to make him heir, and that he could not renounce, albeit he *alleged* that such intromission was no intromission which could burden him, the bed and macer being yet undisposed upon by him, and that the same pertained not to the defunct, but pertained to their mother, who gave her umquhile son the use thereof; and after his decease she meddled with the same, her said umquhile son remaining in a chamber within that same turnpike where the mother dwelt, pertaining to her, and where he was entertained and supplied by her; likeas her name was engraved upon the macer and she intromitted with the same; notwithstanding all which, the allegiance was sustained to make him heir, specially seeing that he dwelling in an house of his own when the brother died, he, after his decease, left his own house and entered and dwelt in that house where his brother died, which was sustained, albeit he *alleged* that it was done by his mother's warrant to whom that house where his brother died pertained, and where she received him; but it was *alleged*, that this heir of line, after his brother's decease, locked the door of the house and kept the keys thereof, and suffered none to enter while he entered himself.

Act. *Cunninghame.*Alt. *Herriot.*Clerk, *Scot.**Fol. Dic. v. 2. p. 27. Durie, p. 481.*1636. *January 27.*STRAITON *against* CHIRNSIDE.

WHERE the predecessor had died at the horn, his escheat gifted and declared, the apparent heir's intromission, after the declarator, with moveables that were in the defunct's possession, did not infer behaviour; because it was not intromitting with his predecessor's goods, but with what belonged to the donatar, and which intromission, therefore, could be of no prejudice to the predecessor's creditors.

*Fol. Dic. v. 2. p. 28. Durie.** * This case is No 17. p. 5395, *vocæ* HEIRSHIP MOVEABLES.1663. *February 21.*STIRLING *against* CAMPBELL.

AN heir's intromission with the whole silver work, is a behaviour as heir, since therein is comprehended the best of the kind which is the heirship.

Fol. Dic. v. 2. p. 27. Stair.

* * This case is No 8. p. 9656.

1663. February 26.

JAMES CUTHBERT of Dragacres against ROBERT MONRO of Foulis.

No 24.

Found in conformity with
Straiton against Chirnside, No 22.
p. 9664.

THE said James pursues the said Robert Monro, as heir to his predecessor the Laird of Foulis, for payment of a debt due by him, and insists against him as behaving himself as heir by intromission with the moveable heirship. The defender *alleged* absolvitor, because it was not condescended that the defunct was a person who could have an heir as to heirship moveables, as being prelate, baron, or burgess; and, if the lands of Foulis be condescended on, it is offered to be proved, that he was denuded by apprising before his death, to which apprising he had right before he was apparent heir, being tutor to another who was apparent heir for the time; and therefore the defender has neither behaved himself as heir by intromission with the moveable heirship, nor the rents of the defunct's lands. 2do, The defender died rebel and his escheat gifted and declared, and so *nihil habuit in se bonis*, and could have no moveable heirship. It is *answered* for the pursuer, to the first, *Non relevat*, that the lands were appraised from the defunct, unless the legal had been expired, yet *semel baro semper baro*. 3tio, The pursuer having taken right to the apprising while he was tutor *ipso facto*, it accresced to the pupil and thereby was extinct, and cannot defend his intromissions. 4to, It was for a small sum and satisfied by intromission of a year or two, so that the continuance of the apparent heir in the possession after he was satisfied is *gestio*. 5to, The gift and declarator if it was done during the rebel's life, it was simulate *retenta possessione*, and so null.

THE LORDS found the apprising not to purge the intromission unless the legal had been expired, in moveable, and his apparent heir might behave himself as heir by intromission with the rents of the appraised lands; but if the legal was expired, they found it sufficient, and that *semel baro semper baro* is only to be understood *presumptive, nisi contrarium probetur*; as also they found the defender his taking right to the apprising, while being tutor, or continuing in possession after satisfaction thereof by intromission, not to infer the passive title, and that the gift and declarator did take away the heirship moveable, unless it were offered to be proved *simul* or *retenta possessione* during the rebel's lifetime. See PRESUMPTION.

Fol. Dic. v. 2. p. 28. Stair, v. 1. p. 188.

•• A similar decision was pronounced, 22d December 1674, Seaton against Seaton, No 21. p. 5397, *voce* HEIRSHIP MOVEABLES.

1663. June 10.

SIR WILLIAM GORDON of Lesmore *against* Mr JAMES LEITH.

No 25.
Found in conformity with
Grainger against Grainger,
No 12.
p. 2657.

SIR WILLIAM GORDON of Lesmore pursues Mr James Leith of New Lesly, as representing his father on all the passive titles, and condescended that he behaved himself as heir, by meddling with his father's heirship moveables, and with the mails and duties of his father's lands of New Lesly and Syde. The defender *answered* to the *first*, That his father could have no heirship moveables, because he died rebel and so his hail goods belonged to the King as escheat; *2dly*, If need be, he offers him to prove that he died not only rebel, but his escheat was gifted; and so as a confirmation takes away vitious intromission with moveables, so the gift with the escheat must purge vitious intromission with heirship, being before intending of this cause; *3dly*, He offers him to prove that the heirship moveable was confirmed promiscuously with the rest of the moveables, and that the defender had right from the executor; which confirmation, though it could not be effectual to carry the heirship, yet it was a colourable title to show that the defender had not *animus miscendi*, but that he meddled by a singular title, and neither formerly drew an heirship nor meddled therewith, as heir apparent. The pursuer *answered* to the *first*, That it was not relevant that he was rebel, nor that his escheat, unless it had been gifted before his intromission as well as before intending of the cause, and that the defender had right from the donatar. To the *second*, it was *answered* by the pursuer, That the promiscuous confirmation was not sufficient, because he offered him to prove, the defender confirmed his own servant to his own behoof.

THE LORDS found that the defender's father dying rebel was not sufficient, unless it had been gifted and declared before intromission; and they found the reply relevant, that the promiscuous confirmation was to the defender's behoof.

As to the second member of the condescendence, the defender *alleged*, That albeit his father was infest, yet his infestment was only base, not clad with possession; and that the defender's title was by another party possessing and publicly infest before his father's death.

Which the LORDS found relevant.

Fol. Dic. v. 4. p. 28. Stair, v. 1. p. 190.

S E C T. IV.

Intromitting with the Predecessor's Writs and Evidents.

No 26.

1628. July 8.

DUNBAR against LESLIE.

BARE intromission with evidents, no other deed being done thereon, was not sustained to the effect of behaviour. See No 28. p. 9670.

Fol. Dic. v. 2. p. 16. Durie.

*** This case is No 15. p. 5392, *voce* HEIRSHIP MOVEABLES.

No 27.

Intromission with a charter-chest, but not upon inventory, and keeping it more than a year, found to infer behaviour, altho' the apparent heir gave a bond to be accountable, and had never any benefit by, nor intromission with the estate.

1670. June 28.

ELEIS of Southside against CHARLES CARSE.

RICHARD CARSE of Fordell, during his minority, granted a bond to his sister Anna Carse in liferent, and Katharine Eleis her daughter in fee, for the sum of 4000 merks; which being assigned to James Eleis of Southside, he did pursue Charles Carse as heir to Dr Carse his father, who was heir, at least behaved himself as heir to the said Richard, granter of the bond, in so far as the defender's father, Dr Carse, being apparent heir-male to the said Richard, did revoke all deeds done by him during his minority, which revocation was registered in the Sheriff-court books; as likewise, did intromit with the charter-chest of the whole writs and evidents belonging to the said Richard of the estate of Fordell, whereof he granted a receipt, and did keep the same for the space of two years until he died. It was *alleged* by the defender, That albeit he was heir to his father Dr Carse, yet the passive titles libelled were not relevant to make his father represent Richard Carse of Fordell his nephew; *1mo*, Because his father's being only apparent heir-male by revocation of his nephew's deeds, who was minor when he granted this bond, did not behave himself as heir, unless he had served himself heir and intended reduction thereon, which he never did; *2do*, His intromission with the charter-chest could not infer *gestionem pro herede*, because there being an heir of line who had tutors, and the Doctor being apparent heir-male, any intromission he had with the charter-chest, was upon an agreement and receipt bearing an obligation to make forthcoming to any who should have best right, which being granted *intra annum deliberandi*, and that he might advise that the lands were provided to the heirs-male, could not infer *gestionem pro herede* to make him liable to the whole debt, seeing he never made any use of the said writs, nor did serve himself heir, nor ever had any benefit of the estate. THE LORDS did sustain the first defence, and found that a naked revocation, whereupon nothing followed, did not infer a behavi-

our, albeit there were a brieve raised to serve heir, seeing it was never served nor retoured, which deeds were *meræ voluntatis sed non actus legitimi*; but they repelled the second, and sustained the Doctor's intromission with the charter-chest to be a behaviour as heir, seeing it was not done upon an inventory, and that he had never offered to deliver the same by the space of two years; which interlocutor seems very hard, seeing his intromission could not be called vitious, being upon an agreement with the tutors of the heirs of line, and the receipt bearing a bond to make forthcoming, and that he never made benefit of the estate.

No 27.

Fol. Dic. v. 2. p. 28. Gosford, MS. No 284. p.

* * * Stair reports this case :

MR RICHARD CARSE of Fordel, having granted a bond of 4000 merks, to his sister in liferent, and after her decease to her daughter, she assigns the same to James Eleis her brother, who now pursues Charles Carse as heir to Dr Carse, who behaved himself as heir to Mr Richard Carse the debtor, in so far as he intromitted with the charter chest, and gave a receipt thereof to Arniston, bearing, that he as heir to Mr Richard Carse, had received his charter-chest, and all the writs and evidences belonging to the house of Fordel, which charter-chest he kept two years, and died, it being in his possession; likeas, he raised brieves to serve himself heir, and subscribed a revocation of all deeds done by Mr Richard in his minority, which is registrate; the defender *alleged*, the condescendences are no ways relevant, for as to the charter chest, as he might have pursued Arniston to produce it for inspection *ad deliberandum*, so he might receive it from Arniston voluntarily for that same effect, which cannot import behaviour, unless he had made use of some of the writs belonging to him as heir; and this being an odious universal passive title, any probable excuse ought to liberate, especially this Doctor, who was a Doctor of Divinity, residing in England, and ignorant of the law of Scotland, and who never enjoyed the least benefit of Mr Richard's estate, and the defender was content to restore the charter-chest *re integra*, and to instruct by the oaths of the friends consenters, in his discharge, that there was nothing wanting, but it was in the same case he received it; as for the taking out of brieves, albeit it signified the Doctor's purpose to have been heir, yet behaviour must include an act of immixtion, or meddling with the heritage, and *animus adeundi*, as having no other title or intent, but as heir; and as for the revocation, it is a null act, operative of nothing, but for reduction which was not intended, and is no meddling with the heritage. The pursuer *answered*, That there could be no more palpable and unquestionable immixtion, than by the receipt of the defuncts whole writs and evidences, and that without so much as making an inventory thereof, to have been subscribed by the haver of the charter-chest and him; neither has he qualified his receipt, so as that he might deliberate, but bears him an apparent

No 27.

heir, to have received the same simply, likeas he detained the same two years ; and as to his ignorance, *ignorantia juris neminem excusat*, and the pursuer is in this also favourable, that this bond is a provision granted to Mr Richard's sister, and heir of line, and the Doctor, and this defender was but heir of tailzie of a further degree.

THE LORDS found the condescendence relevant conform to the receipt of the tenor foresaid, and the retention of the charter-chest without inventory so long ; whereas it was moved amongst the LORDS, that they had often times refused vitious intromission against any representing the intromitter, unless sentence or pursuit had been against the intromitters in their own life, whether that should be extended to behaviour as heir, where there was no pursuit against the behaviour in his own life ; but the behaviour being so considerable and universal, with all the evidents without inventory, it did not take with the LORDS, neither did the party plead it ; but the LORDS did not find that the taking out of brieves, or the revocation imported behaviour.

Stair, v. 1. p. 686.

1682. February 16.

LAIRD of COXTOUN *against* ADAM DUFF of Drummore.

No 28.

The reverse
of No 26.
p. 9668.

THE tutors of an apparent heir (whose predecessor died after expiring of the legal of an apprising against him) having intromitted with the charter-chest and writs, and received from the pupil after his majority a discharge of all their actings and intromissions ; and he having continued in possession of these writs after he was major, he was pursued *ex eo capite*, as *passive* liable for his predecessor's debt.

Alleged for the defender ; He could not be liable, because the writs being apprised before the defunct died, they belonged not to him but to the appriser ; and the defender meddled with them only *custodiæ causa*, without disposing of any of them ; and the discharge to the tutors was general, making no mention of papers.

Answered for the pursuer ; If apparent heirs were allowed to put their hands amongst the defunct's writs, they might endanger the diligence of creditors, by abstracting and destroying evidents ; and it is now a matter of three years since the defunct's decease.

THE LORDS sustained the said discharge, and continuation of possession of the writs, as a-passive title against the defender ; although formerly July 8th. 1628, Dunbar *contra* Leslie, No 26. p. 9668. ; it was otherwise decided.

Fol. Dic. v. 2. p. 29. Harcarse, (PASSIVE TITLES.) No 29. p. 7.

1684. November —. TROTTER of Mortonhall *against* EUPHIN SCOTT

No 29.

AN apparent heir's giving back a disposition of lands that his predecessor had got without paying the price, and taking a new one, found to be *gestio*, and to make the apparent heir universally liable for his predecessor's debt.

Fol. Dic. v. 2. p. 29. Harcarse, (PASSIVE TITLE.) No 48. p. 11.

*** Sir P. Home reports this case :

HARY TROTTER of Mortonhall, and Sir Laurence Scott, being bound cautioners conjunctly for the deceased Mr. Alexander Spalding Advocate, to Sir Archibald Primrose late register, for the sum of 10,000 merks, and Mortonhall having paid the hail sum ; he pursues Euphin Scott, as representing Sir Laurence her father upon the passive titles, for payment of the half of the sum and bygone annualrents ; and she having *alleged* upon a disposition granted to her by her father, of the lands of Eymouth, to purge the passive title, and Mortonhall having reduced the disposition *ex capite inhibitionis* ; and thereafter having insisted against the said Eupin Scott, as behaving herself as heir to her father, by intromitting with the rents of the lands, after the disposition was reduced ;—*alleged*, That she could not be liable as behaving as heir, because she intromitted by virtue of a wadset of the lands, granted by the Laird of Wedderburn to Mr Patrick Home Minister at Hatton, for the sum of 5000 merks, which was disposed to Linthill, from whom the defender had acquired right. *Answered*, That the defender acquiring right to that wadset, could not liberate her from that passive title of behaving as heir, because Sir Laurence her father did acquire right to that wadset in his own time, and after his decease, the defender having colluded with Linthill, she gave back her father's right, and took a new right of the wadset from Linthill, in her own person, which was done of design to possess the lands by virtue of that right, and defraud her father's creditors. *Replied* for the defender, That albeit, the right of wadset had been disposed to her father, yet she might lawfully give it back, and take a new right in her own person, because the price was not paid, but only her father gave bond for the same, and she having paid the price with her own money, which her father should have given for that right, she might justly give back her father's right, and take a new right to the wadset, in her own person. *Duplied*, That the pursuer's title as behaving as heir, being the intromitting with the rents of the lands, and others belonging to the predecessor ; and seeing this right of wadset was disposed to the defender's father, whether the price was paid to him for the same, or not, it does not alter the case, but the intromission with the rents of the lands that were disposed to her father, must infer the passive title against her, and she was in *mala fide* to give back her father's right, and take a new right in her own person ; for if that were allowed, it were

- No 29. easy for apparent heirs to defraud all the predecessor's creditors, by giving back, or abstracting of the rights of the lands, and taking new rights from the authors; and seeing the law has made the intromitting with the father's charter-chest, rights of lands, or other papers, and things of very little moment, that belonged to the predecessor, to infer a behaviour as heir; much more ought the giving back a right of lands granted to the predecessor, and taking new rights in the apparent heirs own name, infer a behaviour; seeing in that case there is not only an intromitting with the rights of the predecessor's estate, but there is *dolus* and fraud in giving back these rights in the apparent heirs own person, of purpose to defraud the predecessor's creditors; and seeing the least intromission in law without a lawful title, will infer a behaviour; much more ought such a deed which is both intromission and fraud, and the defender has paid of the price, that her father should have given for that right, with her own money, will not liberate her from the passive title, because the lands were her father's, albeit the price was not paid. And if any man should buy a barony of land, and give bond for the price, if his apparent heir should intromit with the rents of the lands, he would be liable as behaving as heir, albeit he paid the price of the lands, after his predecessor's decease. THE LORDS repelled the defence proponed for the defender, bearing, that her intromission was by virtue of a right acquired by her from Linthill; in respect of the reply proponed for the pursuer, bearing, there being a right formerly granted by Linthill in favour of the defender's father, the defender gave back that right of wadset to Linthill, and took a new right from him in her own name, which they admitted to the pursuer's probation.

Sir P. Home, MS. v. 2. p. 629.

1687. January 26.

JOHN JOLLY Merchant in Edinburgh *against* The VISCOUNT of KENMURE.

No 30.

THE debate, John Jolly merchant in Edinburgh, against the Viscount of Kenmure, on the passive titles, was advised; and the LORDS found it a passive title, that he had given back a tack of teinds which was for years to run, and had taken a new one in his own name. See the like found before in Stair's Institutes, B. 3. T. 7. But they found the Viscount's allegiance relevant to purge this passive title, that he bruiked by an expired comprising, providing always that the comprising expressly mentioned and contained tacks of teinds; which was thought too favourable for apparent heirs.

Fol. Dic. v. 2. p. 29. Fountainhall, v. 1. p. 443.

* * * Harcarse reports this case :

No 30.

1686.—*March*—. My Lord Kenmure being pursued as representing Lord Robert, upon this passive title, that he, the defunct's heir-male, had intromitted with teinds, whereof his predecessor had died in the possession by virtue of tacks yet unexpired;

Answered; The procuring a tack from the bishop, and paying a grassum to him by the defender, (who was not master of the charter-chest that was sequestered,) being *error facti invincibilis*, ought not to make a passive title.

Replied; An apparent heir cannot pass by the predecessor's rights, and acquire new rights of the same subject; and the defender's predecessor's right to the teinds uplifted, was notour in the country.

THE LORDS sustained the passive title; but thereafter stop till November.

1687.—*February*—. In the foresaid cause at the instance of Jolly *contra* the Lord of Kenmure, mentioned *supra*, March 1686; it was farther *alleged* for the defender, That the tack of teinds was appraised, and the legal expired before Lord Robert's death. *2do*, The defender offered to prove, that he had a factory from the appriser, in case the legal were not expired; which allegances the LORDS found relevant *separatim*; and it was not pleaded by the pursuer, that Lord Robert died in possession of the teinds, though the legal expired.

Harcarse, (HEIRS.) No 64. & 67. p. 12.

1698. *January 28.*

EARL of AIRLY and URQUHART *against* Sir WILLIAM SHARP.

THE LORDS advised the cause pursued by the Earl of Airly and Urquhart of Knockleith, his trustee, against Sir William Sharp of Scotsraig, as representing his uncle, Sir William Sharp of Stonyhill, on the passive titles, for payment of 9000 merks, contained in his ticket and obligation. And Sir William having deponed, he denied any intromission with the charter-chest, or writs of his uncle's lands; but acknowledged, his uncle, five days before his decease, gave Sir James Cockburn the key of his closet (where some of his writs lay) to deliver to him, who was then absent; and having received the same after his uncle's death, he opened the closet, and went in with Cockburn and Sir Thomas Moncrieff, and afterwards he entered several times alone, but meddled with no papers, save what were his own by the assignation his uncle had made to him of all his personal estate. From this oath it was *argued* for Airly, That it was sufficient to prove behaviour as heir, which was inferred not

No 31.

Intromission with the defunct's writs being referred to the apparent heir's oath, he deponed he intromitted with no writs but what were his own, in consequence of an assignation made to him by the defunct of his personal estate; this was found not to

No 31.
infer behavi-
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in his oath, he
owned his en-
tering the
closet where
the defunct's
writs lay,
without either
the presence
or the war-
rant of a
judge.

only from intromission with the rents of their predecessor's lands, but likewise with his writs, with which no apparent heir should meddle *brevi manu* at his own hand, without the presence and authority of a Judge, and making of an inventory. *Alleged* for Sir William Sharp, That *gestio pro herede* is only inferred by meddling with a charter-chest, and the writs and evidents of the defunct's lands; but here it was only the entering into a closet, and touching no papers relating to heritage, by which *gestio pro herede* is inferred, but only the writs of his personal estate, whereunto he had right; *2do*, Meddling with the writs of a moveable fortune is not *gestio*, but vitious intromission, which in law is purgeable by any *titulus coloratus*. But Sir William had more; for he had a legal and valid disposition from his uncle to his whole personal estate, which was a sufficient warrant for his intromission, and must purge the passive title; *3tio*, You having no other probation but by my oath, you cannot divide it, but must take it complexly; and I have deponed I took out no papers but what I had right to by assignation from my uncle. *Answered*, Whereas it is denied, that he meddled with the charter-chest, this is *lis de nomine*, and a playing on the ambiguity of the word; for many have no charter-chest, properly so called. But it is all one, if the apparent heir contrectate the defunct's papers, whether they be in trunks or cabinets, or in a closet and study, or in shelves, or lying on a table in a lock-fast room. And it is a great mistake to assert, nothing infers behaviour but meddling with writs of lands; for Sir William's entering where his uncle's writs lay was an immixtion *per universitatem*, and it is not sufficient to exoner him, that he took away none but what he was assigned to; for, *1mo*, This is to depone *in jure*, which law does not allow, in making himself judge what he had right to; and, suppose his uncle had disposed to him a part of his lands, Sir William's deponing that he took out no more writs but the evidents of the room disposed to him, would *nullo modo* exoner or excuse him from behaviour; *2do*, The quality of his oath, that he took out no more writs but his own, is wholly incompetent and extrinsic, and noways to be regarded, unless it were otherwise proved; and his right by assignation from his uncle can be no title to intromit with the writs at his own hand, after his uncle's death, without the warrant of a Judge: And, on the 28th of June 1670, in the case of Eleis of Southside against Garse, No 27. p. 9668. the Lords found an apparent heir's granting a receipt of the charter-chest was a behaviour; and February 1682, (after the time of Stair's printed decisions,) between Innes of Cockston and Duff of Drumsnit, No 28. p. 9670. the meddling with a charter-chest was a *gestio*, though received from an appriser, whose right was expired, and legal run. Sir William's Lawyers cited the common law, l. 20. D. De acquir. vel omit. hered. where *gestio pro herede est magis animi quam facti*. It must be considered, *quo animo* he meddled. And the tract of decisions favour him; as 8th July 1628, Dunbar against Lesly, No 26. p. 9668. where simple intromission with writs, where no use is made of them, does not import behaviour; and 22d March 1628, Farquhar

against Campbell, No 5. p. 9654.; 26th February 1663, Cuthbert against Monro, No 24. p. 9666.; 4th July 1665, Innes against Wilson, *infra*, h. t. and 17th July 1666, Ogilvy against Gray, No 42. p. 9684. And seeing there is neither law nor custom against such intromissions, whatever inconveniencies may follow, Sir William ought to be assoilzied. And the Lords, for preventing the danger arising to creditors, may make an act of sederunt, regulating the case, and prohibiting such clandestine intromission in time coming, and declare it shall infer a passive title hereafter, as the LORDS did in the known case of Glendonwyne against the Earl of Nithsdale, in 1662, *infra*, h. t.; or may procure an act of Parliament *pro futuro*.—THE LORDS, by a scrimp plurality of six against five, assoilzied Sir William, and refused to divide his-oath, though most were convinced this might embolden apparent heirs to embezzle their predecessor's writs *in necem creditorum*; but some thought it hard to begin the preparative here.—See QUALIFIED OATH.

Fol. Dic. v. 2. p. 29. Fountainball, v. 1. p. 817.

1698. February 26.

MURRAY against BLAIR.

No 32.

MURRAY of Levistoun having pursued Blair of that Ilk, on the passive titles, for payment of a debt of his father's; which being referred to his oath, he deponed, he being put in the fee of his father's estate at the age of six years old, he meddled with no other papers of that charter-chest, but what concerned the lands disposed to him. Which being advised, the LORDS thought this different from Sir William Sharp's case, *supra*, 28th January 1698, No 31. p. 9673. a charter-chest being *nomen universitatis*, and found him liable. Blair finding the hazard of the decision laying him open to all his father's creditors, he immediately transacts with Levistoun, and gets up the hail process from the Clerks, particularly the oath, and burns them. Boyle of Kelburn, and the other creditors who were attending the event of this cause, give in a bill, craving the process might be secured, and the Clerks who had lent it up ordained to call it back. Some argued, that parties agreed might take up their papers, and do what they pleased with them. Others *answered*, That a party might take up his bonds, or other writs produced by him, as instructions; but it was *pessimi exempli* to give up principal oaths, or depositions judicially taken; for these became common evidents to all concerned, and to burn or cancel these might be pursued criminally and punished. THE LORDS did not determine this, being the last day of the Session; but ordained the Clerks to do diligence against him who had given his receipt for the process, that the Lords might know what had become of it,

Fol. Dic. v. 2. p. 29. Fountainball, v. 1. p. 829.

No 33.

An appriser executed a renunciation of his right in favour of the debtor, which he kept in his own custody till his death. His apparent heir, by intermeddling with it, and giving it up to the debtor for gain, was found to have incurred behaviour.

1701. July 23.

JOHN BAILLIE *against* ALEXANDER CHANCELLOR.

JOHN BAILLIE of Woodside pursues Alexander Chancellor, merchant in Edinburgh, for a debt due by Helen Barns, his mother, on this passive title, that Helen having an apprising on the lands of Bagbie, she subscribed a renunciation thereof, which he either found among her papers after her decease, and kept it, which meddling was an undoubted gestion and behaviour, or it was in his hands before her death, and was after it given by him to his brother William, to be given up to the debtor-reverser, in prospect of gain. *Alleged*, He got it from his mother to give up to the party; and though his endeavouring to get money for it might be a fault, yet it cannot amount to the passive title, especially seeing he had the gift of his mother's escheat, which is a probable and colourable title to assoilzie from behaviour, as Stair shews, Book 3. Tit. 6.; and 10th June 1674, Spencerfield against Hamilton, *infra*, h. t. 2do, He had a *dispositio omnium bonorum* from his mother, which is enough to elide behaviour, which is only inferred by deeds transmitting property, and not by renunciations extinguishing it, 5th July 1666, Scot against Auchinleck, *infra*, h. t. *Answered*, His giving up and disposing upon the said renunciation could be by no other title but *animo domini et heredis*; neither does the escheat palliate, for that gives right only to moveables, whereas this was an heritable subject; and her *dispositio omnium bonorum* gave as little right, being only deposited in the Clerk's hands to get her *cessio* and suspension, and belonged to all the creditors as much as to him, and was never his evident. The Lords repelled the defence, and found his intromitting with and disposing on the said renunciation, after his mother's death, on prospect of money, was sufficient to infer the passive title of behaviour, and that the gift of escheat nor *dispositio omnium bonorum* did not purge; and thought this way of evacuating the predecessor's fee by renunciations, was a more dangerous invention to the prejudice of creditors in redeemable rights, and might cover the intromissions of apparent heirs more than any of the former contrivances had done.

Fol. Dic. v. 2. p. 29. Fountainball, v. 2. p. 121.

No 34.

An apparent heiress and her husband, mean persons, having received from the defunct's man of business, the

1706. June 15.

DIGGLES and his FACTOR *against* STEWARTS.

THOMAS STEWART, merchant in Newcastle, being debtor to John Diggles, merchant in Manchester, in L. 80 Sterling, by bond, the said Diggles, and Andrew Dennet, his factor, pursue Janet Stewart, sister and apparent heir to the said Thomas, and John Stewart her husband, for payment on the passive titles; and insisted on this ground, that she and her husband had granted a receipt to John Knox writer, of her brother's writs and evidents, and, particu-

larly, of an heritable subject belonging to him, by adjudication from one Jamieson, his debtor, and had paid Knox an account to get them up, and make themselves masters of his papers; and the husband having signed the receipt, must be liable as well as the wife. *Alleged, 1mo, Absolvitor, quoad* the husband; because the passive title of *gestio pro barede* can reach none but those who are nearest heirs *et aliqui successuri*; whereas he, though the apparent heir's husband, is himself a stranger to the debtor; *2do*, As to the wife, *esto* she did represent, yet being *vestita viro*, she can be liable only in the event of the dissolution of the marriage; but, *3tio*, She can never be liable for taking up these papers; for though intromission with rents of lands, and other moveable goods, and the defunct's charter-chest *per aversionem*, without warrant or making inventory, infer a passive title of behaviour; yet she is not in that case, for here she receives only papers up from her brother's writer upon inventory, mentioning every individual writ, and never made use of them; and so there can be no fraudulent design, nor prejudice to the creditors, seeing she is ready to make them forthcoming for their behoof; and being poor rustics, their simplicity is sufficient to exoner them from such an odious passive title as vitious intromission, seeing they have done a favour and benefit to the creditors, by preserving the papers, and so there was no *animus immiscendi universaliter*, but only for custody and conservation. It is true, intromitting with the defunct's goods, without a title, is what the law calls *crimen expilatae hereditatis*, and looks like stealing from the dead; but the taking up a few papers can admit of no such construction; and the LORDS, on the 28th June 1670, Ellis against Kerse, No 27. p. 9668. found the receipt of a charter-chest, by an apparent heir, without inventory, inferred this passive title; *ergo a contrario sensu*, the taking up of a few papers, upon inventory, can never import it. And the reason of this passive title, for fear of embezzling and abstracting the writs, cannot take place here, because they were received by inventory, and are now offered *re integra* to the creditors. *Answered*, If this be not sufficient as a passive title, it will open a door to apparent heirs to intromit with their predecessors writs, and defraud their creditors, and yet not be liable; whereas all such intromission, without authority or warrant of a Judge, is vitious and clandestine; and was so found since the Revolution, in the case of Murray and Drummond against the Laird of Blair, No 32. p. 9675.; and before it, betwixt Innes of Coxtown and Duff of Drummore in 1682, No 28. p. 9670. And the LORDS demurred on it in the case of Urquhart of Knockhill and Sir William Sharp, No 31. p. 9673. And the producing the papers now *non relevat* to assoilzie, no more than if one who had intromitted with his predecessor's rents should offer to restore them; and the reason of law is clear, for the apparent heir has year and day to deliberate, and if he apprehend danger, he may abstain; but if he will put to his hand and meddle, it is just he should be liable, he having so easy a remedy to forbear, and will not; especially seeing they paid money for getting them up; and the defunct's order for delivering them makes against them,

No 34.

writs and evidents of his real estate, upon inventory, for which they granted receipt; the LORDS, in this case of poor ignorant people, who made no use of these papers, assoilzied from the passive title.

No 34.

for that is as much as if he had disposed the adjudication to them; in which case, she would have been liable *per praeceptionem hereditatis*. It is true, in 1628, No 26. p. 9668. one was assoilzied, though he had intromitted with his father's evidents; but there the specialty was, that it was done in his minority.—THE LORDS, by a plurality of five or six against four, found, in this circumstantiated case of poor ignorant people granting a receipt of papers upon inventory, without qualifying any use they had made of them, that it was not a passive title.

Fol. Dic. v. 2. p. 28. Fountainball, v. 2. p. 334.

1709. January 25.

MR JOHN CHALMERS against Sir WILLIAM SHARP.

No 35.

Accepting of a key, and taking papers particularly assigned, found not to infer behaviour.

MR JOHN CHALMERS, writer, having right to a bond of Sir William Sharp's of Stonnyhill, pursues Sir William Sharp of Scotsraig, his nephew, and apparent heir, on the passive titles, and refers them to his oath; and he having deponed, it was *contended*, That he had acknowledged as much as inferred a *gestio pro barcade*, in so far as he owned, that, being at London the time of his uncle's death in 1686, on his return, Sir James Cockburn gave him the key of a room which the defunct had desired him to deliver to him, and that he had gone in several times, both alone and in company, and viewed the papers there contained; which searching and intromission was sufficient to infer behaviour as heir. *Alleged*, His uncle having disposed to him several particular funds and subjects, he had all the reason in the world to try for the grounds of the debts to which he was assigned, without which his right would have been ineffectual; and his oath being the sole mean of probation, he has denied intromission with any other writs whatsoever, except those especially disposed to him. And that which both the Roman law and ours pitch on as the great characteristic of behaviour, being the *animus adeundi et abstrahendi*, there is no pretence for this fancy here, seeing it is plainly ascribable to his singular right and title of a special assignation from his uncle; which being *titulus probabilis et coloratus*, is more than sufficient to assoilzie from an odious and unfavourable passive title; and thus a tolerance from a donatar of escheat or recognition has been sustained to assoilzie the apparent heir's intromission, in July 1665, and July 1666, and January 1667.* *Answered* for Chalmers, That the laws of no nation had more strictly provided against the frauds and embezzlements of apparent heirs than ours, and it was *pessimi exempli* to allow them access to charter-chests, and ransack their predecessors papers summarily at their own hand, when law had provided an easy remedy, by applying to a Judge, and entering by his warrant and authority, and inventorying the writs; which method he having neglected, *pessimum* is to be presumed against him, that he has abstracted the writs; and creditors must not be put to impossible expiscations of the particulars, where he had a promiscuous intromission *per universitatem*. And thus have our wise

* See APPENDIX.

predecessors decided, as far back as the practiques go, as appears from Haddington, 8th March 1610, Baillie against Home, No 13. p. 9658. ; Durie, 15th January 1630, Cleghorn against Fairly, No 21. p. 9664. ; and Stair, 28th June 1670, Ellics against Carse, No 27. p. 9668. ; and Innes against Duff, No 28. p. 9670. ; and since the Revolution, in the Laird of Blair's case, No 32. p. 9675. the Lords expressly found them liable, if they did not apply to a Judge, and get them inventoried. And the accurate French Lawyer, in his *Traite des Loix Civiles*, in handling heirs making inventories, lays this down as a rule, that if a son immix without getting the papers sealed or inventoried, he renders himself purely and simply heir ; and that eminent English Civilian Swineburn affirms, an executor omitting to make inventory is even bound to legatars, and so much more to creditors. The Lords, by plurality, found his accepting the key, and taking the papers to which he was specially assigned, did not infer the passive title of behaviour. But all were generally convinced, that it was of a dangerous consequence to allow such intromissions ; and, therefore, deserved amendment and regulation, by an act of sederunt, *pro futuro*.

Fol. Dic. v. 2. p. 29. Fountainhall, v. 2. p. 483.

SECT. V.

Husband's Intromission in name of his Wife.

1685. January 15. DINGWALL against IRVINE.

No 36.

THE LORDS refused to sustain the husband's intromission to bind behaviour upon her (his wife) as heir to her father ; yet women heirs may thus shun debt by marrying ; only the husband will be liable as intromitter. *Quaritur*, If a confirmation *ante metam litem* will purge it, being of beitchip.

Fol. Dic. v. 2. p. 29. Fountainhall, MS.

1703. December 17. LINTHILL against DICKSON.

No 37.

HOMER of Linthill being creditor to Dickson of Overmains, pursues Phillis Dickson, daughter and apparent heir to his debtor, and William Stewart her husband, on this passive title, that she had behaved as heir, in so far as she had

It was the opinion of the Court, that

No 37.

the husband's intromission with the rents of an estate, of which his wife was apparent heir, was sufficient behaviour to subject her universally to her husband's creditors; but it being craved no higher, but *in valorem*, the Lords found the husband liable in so far as his intromission should be proved against him.

intromitted with the rents of her father's lands, either herself, or her husband in her right of apparence, and so both must be liable. *Alleged, 1mo*, She was not *alioqui successura*, seeing she produced a charter of the lands from the Earl of Haddington, superior, to one of her predecessors, providing it to his heirs-male. *Answered*, This is an old right 90 years ago, and may be changed since; likeas, *de facto*, the lands being appraised by a creditor, her father acquired in the said appraising, and took it to his heirs whatsoever, which quite alters the first destination; *2do*, Yourself granted a bond to a confident, whereon you were charged, and having renounced, adjudication followed, which was the title used in the process of sale, and so makes you liable on the act of sederunt 1662, in Glendonwyne's case against the Earl of Nithsdale, *infra h. t.*—

Tax Loads repelled the first defence, in respect of the answers. *2do, Alleged*, *Esto* I were apparent heiress *et alioqui successura*, yet my husband's intromission can never make me liable *passive*; such titles, *cum rapiant delictum, suos duntaxit tenere debent auctores*, and being personal, cannot be extended from the husband's intromission to the wife, who may be ignorant and unwilling, that her husband should involve her, and yet cannot hinder it; and this might ruin all heiresses, by binding a passive title on them without their own consent, which will affect them after the dissolution of the marriage, by involving them in vast debts: The wife here cannot be liable, for she did not intromit; and for the husband, he is as little, seeing he is not the apparent heir; for none can be subject to behaviour, but one who can be served heir: And lately in the Earl of Winton's case with one Borthwick, No 66. p. 5327. it being contended, that he having married the heiress of Aldinston, and bought in a comprising, it ought to be redeemable from him, the husband, as if the apparent heir had acquired it; yet the Lords found this was too great an extension of the fiction in law, and that it was not so redeemable from him; see Stair, 19th July 1681, Sir George Monro against the Creditors of the Lord Rae, No 59. p. 5317. And Linthill has taken the wrong method; for he should have charged her to enter heir to her father, and, on her renunciation, have adjudged these rents, as lying in *hereditate jacente*, and then pursued the husband as intromitter; but to make it summarily a passive title, were both a novelty and hardship. *Answered*, If an heiress can evade the passive title, because she does not intromit herself, and her husband sicklike evade it, because he is not the person that can succeed or behave, by this circular juggling heiresses may *impune* possess their predecessors estates, and the security of creditors be wholly overturned; for a minor will be liable *passive* for his tutors' and curators' intromissions; and why not a wife for her husband's, who is her curator in law; and though minors will be reponed, yet not without restoring what was intromitted with; and though the pursuer might plead this to be an universal passive title, yet at present he insists only to make the husband liable *in valorem*, in so far as he has intromitted, seeing he pretends no other title but as husband; and if they will not pay the debt, then let husbands abstain; else it were a compendious way for heiresses to

marry, and defraud their predecessors' creditors; neither are they obliged to run a course of diligence by adjudication, seeing I have this shorter method of fixing it as a plain behaviour; and if you offered to renounce, I would not suffer you, because having immixed, *res non est amplius integra*. Some of the Lords were clear to find it an universal passive title to make them simply liable; but it being craved no higher but *in valorem*, the LORDS found the husband liable in so far as his intromission should be proved against him; seeing they are *una persona in jure*, and his intromission in her right must be reputed to be her own intromission, which if it were, she behoved to answer her predecessor's creditors *in solidum*; and here it was no farther extended than to his actual intromission, and not to make them simply liable.

Fol. Dic. v. 2. p. 29. Fountainhall, v. 2. p. 202.

S E C T. VI.

Behaviour not inferred if the intromission can be ascribed to a singular title.

1628. July 8.

DUNBAR *against* LESLIE.

No 38.

THIS defence against an heir's intromission, viz. that the father's relict had a different tack of the lands, and by her tolerauce he intromitted, was found relevant.

Fol. Dic. v. 2. p. 30. Durie.

*** This case is No 15. p. 5392., *voce* HEIRSHIP MOVEABLES.

1630. January 30.

CALDERWOOD *against* PORTEOUS.

No 39.

PORTEOUS being convened for payment of L. 100 addebted by his father, as behaving himself as heir to him, by intromission with his heirship goods; and he alleging his intromission to have by been virtue of an anterior disposition made by his father of the same to him. THE LORDS sustained this disposition to liberate him; albeir the pursuer *replied*, upon the father's retention of the possession, notwithstanding of the disposition, to the time of his decease; which was repelled, seeing the defender *duplicated*, that his father becoming old and decayed in means, and wanting a wife, she being then deceased, and the son be-

No 39.

ing married thereafter, remaining with him together in one family, that could not make the father to be esteemed possessor, seeing rather the son might be reputed to entertain his father, which was sustained. *See PRESUMPTION.*

Clerk, *Hay.**Fol. Dic. v. 2. p. 30. Durie, p. 488.*

No 40.

The heirship being confirmed promiscuously with the rest of the moveables, and the apparent heir having right from the executor, the confirmation, though not effectual to carry the heirship, was founded upon as a colourable title to shew, that the apparent heir had not *animus immutandi*, since he intromitted by a singular title. This was repelled, the executor being the apparent heir's servant, and confirmed for his master's behoof.

1630. December 16.

RELICT OF KER against KER.

ONE Weir relict of umquhile John Ker, being made assignee to a bond, made by the said umquhile John, pursues Ker of Cavers, as behaving himself as heir to him, by intromission with his heirship goods, for registration of the bond. And the defender *alleging*, That these goods were contained, and confirmed in the defunct's testament, and that he bought the same from the executor confirmed, whereby he could not be liable for the defunct's debts, as heir, having another title for his intromission, albeit the goods might be found heirship, seeing he intromitted not with the same as heir, but by another title; the LORDS repelled this exception, and found, that the confirmation of the heirship goods, which were not in law confirmable, except the heir had offered collation thereof to the executors, that he might have been partaker with them of the defunct's goods, and the buying of them from the executor, could not liberate this defender from being answerable for the defunct's whole debts, he being that person who was heir of blood, and apparent heir to him, and who ought to have adverted to his own case and danger. This was done specially seeing the pursuer offered to prove, that the testament was confirmed by the travel and expenses of this defender; and that the executor confirmed was his own actual servant, whose name he had used, and interponed in the confirmation, to his own use and behoof; which the LORDS sustained, and admitted it to probation, to infer *ut supra*.

Act. ———.

Alt. Trotter.

Fol. Dic. v. 2. p. 30. Durie, p. 549.

* * * Spottiswood reports this case :

BESSY WEIR convened Thomas Ker of Cavers, as he that had behaved himself as heir to his uncle John Ker, by intromission with his heirship goods and gear. *Alleged*, Any intromission he had was by buying an horse from him that was confirmed executor to John. *Replied*, That horse being the best of the defunct's and pertaining to the heir, could not be confirmed as falling under executry. But notwithstanding thereof he being the party that should be heir, and having intromitted with the said heirship horse, must be thought *eo ipso* to

have behaved as heir, and cannot clothe himself with any other title; especially the pretended executor being his own servant, whom he had confirmed to colour his intromission. *Duplied*, Nisi animus adsit in adeunda hæreditate, non præsumitur gestio pro hærede, and his intromission by virtue of any particular title should free him, at the least he should be no further obliged, but to restore the said horse or the price of him. "THE LORDS repelled the allegiance and found his intromission foresaid, although upon a pretended title, made him heir and convenable *in solidum*."

No 40.

Spottiswood, (HEIRS.) p. 141.

* * This case is also reported by Auchinleck:

BESSY WERN pursues registration of a bond granted by umquhile John Ker of Duddingston against Cavers, heir to the said umquhile John, at least intromitter with his heirship goods, viz. the best horse, &c. It is *excepted* by the defender, That the heirship goods condescended were confirmed by the executor of the defunct, and that the defender bought the same goods from the executor, and so was *in bona fide* to intromit therewith, and that *titulus coloratus*, was enough in this case to defend him from bringing upon him to be heir, and the most that can be decerned is that he make the price and goods furthcoming to the creditor. To which it was *replied*, That the heirship goods ought not nor should not be confirmed in the testament, and that this coloured title ought not to defend the apparent heir, seeing he used a manifest fraud in all this to the prejudice of the creditors; for it was offered to be proved, that this testament was confirmed to the defender's use, *hoc attento*, that his own domestic servant was confirmed executor, and that he made and debursed all the charges. THE LORDS repelled the exception in respect of the reply.

Auchinleck, MS. p. 7.

* * A similar decision was pronounced 10th June 1663, Gordon against Leith, No 25. p. 9667.

1662. January 8. BARCLAY against The LAIRD of CRAIGIVAR.

No 41.

ANDREW BARCLAY pursues Craigivar, as intromitter with his father's lands wherein he died infest, for payment of a debt owing by his father. It was *excepted*, That any intromission that he had, was by virtue of a comprising deduced against him for his father's debt, for which decret was obtained against him as charged to enter heir to his father, to which comprising the defender had right. It was *answered*, That the defender being apparent heir, and having right to the legal reversion of the comprising deduced against himself, the

No 41.

comprised was not expired; and to acquire such a right and possess thereby imports *gestionem pro barede*.

THE LORDS found the exception relevant, notwithstanding of the answer unless the pursuer would allege and prove, that he intromitted with more than satisfied the comprising; and found, that he might as lawfully buy an unexpired comprising as a wadset.

Fol. Dic. v. 2. p. 30. Gilmour, No 14. p. 13.

* * * Stair reports this case :

1662. *January 10*—ANDREW BARCLAY pursues the Laird of Craigivar, as representing his father upon all the passive titles, to pay a bond due by his father, and insists against him, as behaving himself as heir, by intromission with the mails and duties of the lands of Craigivar and Fintry. The defender *alleged* Absolvitor, because if any intromission he had (not granting the same) it was by virtue of a singular title, viz. an apprising led against himself, upon a bond due by his father. The pursuer *answered*, *Non relevat*, unless the legal expired; for if the apparent heir intromit within the legal, during which, the right of reversion is unextinct, *immiscuit se bareditati*, and it is *gestio pro barede*.

“ THE LORDS found the defence relevant, albeit the apprising was not expired, unless the pursuer allege, that the defender's intromission was more than satisfied the whole apprising.

Stair, v. 1. p. 78.

* * * The like was found, though the apparent heir had intromitted with more than satisfied the apprising, 26th February 1663, Cuthbert against Munro, No 24. p. 9666.

No 42.

The condescendence of behaviour as heir, by intromission with the mails and duties, was elided, the apparent heir having possessed, by a warrant from the donatar of recognition; for, although that was not a proper title to possess, yet it

1666. *July 17.*

THOMAS OGILVY against LORD GRAY.

THOMAS OGILVY pursues the Lord Gray, as behaving himself as heir to his father, by intromission with the mails and duties of the lands wherein his father died infest, as of fee, for payment of a debt of his father's; who *alleged* Absolvitor, because any intromission he had, was by a warrant and tolerance of Sir George Kinnaird, who stood infest in the lands upon a gift of recognition. It was *answered*, *Non relevat*, unless the gift had been declared before the defender's intromission; because the gift would not have given right to the donatar himself to possess. The defender *answered*, That the gift was declared before the intenting of the pursuer's cause, which declarator, albeit after intromission, yet must be drawn back to the gift, to purge the vitiosity of the defender's intromission, in the same way that the confirmation of a testament

will purge anterior vitious intromission, the confirmation being before the intenting of the cause.

"THE LORDS found the defence relevant to elide the passive title, seeing any colourable title is sufficient to excuse the vitiosity; but did not find that the declarator, before intenting the cause, had the same effect as a confirmation; because, by constant customs, such confirmations purge the preceding vitiosity; which has never yet been found in this case of an heir's intromission with the rents of lands; but the LORDS found the defender liable for the single value of his intromission."

No 42.
shewed the
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heir not to
behave as
heir.

Fol. Dic. v. 2. p. 30. Stair, v. 1. p. 397.

*** Newbyth reports this case :

THOMAS OGILVY pursues the Lord Gray, as lawfully charged to enter heir to his father the Master of Gray, for payment making to him of the sum of 9,000 merks principal, with the annual rent and expenses. It was *alleged* for the defender, That he was content to renounce. It was *replied*, He could not renounce, because the pursuer offered him to prove, that the defender had intromitted with the plenishing of the house of Fowlis, and other moveables upon the Mains; and, with the mails and duties of the lands wherein his father died infest, upon which last member the pursuer declared that he insisted. To which it was *duplied*, That any intromission the defender had was by virtue of a warrant from Sir George Kennedy, who was donatar to the gift of recognition of the lands and barony of Fowlis; whereunto it was *triplied*, That the gift cannot purge the intromission, because the defender, or some other to his use, did intromit long before the gift of recognition of the lands and barony of Fowlis, at least before declarator. To which it is *answered*, That the defender was content to find the first part of the allegiance relevant; and, as to the second, that he had intromitted before declarator, yet being after the gift, the same ought to be drawn back to the date of the gift; just as a donatar to a liferent escheat, who intromitted before declarator by virtue of his gift, and the subsequent decreet of declarator will be drawn back to the date of the gift, *ad hunc effectum* to purge and free him of any vitious intromissions; and the like in a confirmation in a defunct's testament, which will purge being within year and day. To which it was *replied*, That the defender's intromission cannot be drawn back to the date of the recognition, but the same ought to import a behaviour; because there is a great difference in law betwixt a gift of ward and non-entry, and a gift of escheat and a gift of recognition; for it is not denied, but a donatar to a gift of ward may pursue for mails and duties, and for removing; and a donatar to escheat may intromit with goods and gear belonging to a rebel, even before a declarator; and the reason is, because, in all the gifts, the donatar's right is clearly proved by writ, and the decreet following thereupon is but *juris*, and not *facti*, against which, hardly any thing.

No 42. can be objected that can extinguish the donatar's gift *in toto*; whereas, recognitions being founded upon the vassal's proper delict and contempt of his superior, by disposing the greatest part of the feu holden ward of him without his superior's consent, there is a necessity for the donatar, not only to allege that, but to prove so many deeds done by the vassal, by granting disposition and infestment as may infer the recognition craved; which deeds of the vassal being *facti* must abide probation, and the event is dubious, wherein possibly the donatar may succumb, and his gift prove ineffectual; and therefore, unless the defender allege, that there is not only a gift of recognition, but a subsequent declarator obtained thereupon, upon probation of so many deeds done by the Master of Gray, as may conclude the gift of recognition, alleged on the defender's intromission had before declarator, must import a behaviour as heir; which he cannot do, there being no such declarator yet obtained, but allenarly an act of litiscontestation and circumduction of the term against some of the defenders, called in the recognition, neither was the probation renounced, nor the cause advised, nor the parties heard, why the deeds and dispositions granted by the deceased Master of Gray, did prove the recognitions craved; neither was the rental of the barony of Fowlis proven, or that there were so many deeds proven as would make up a disposition of the greatest part of the said barony, holden ward, as said is; till all which be done, the donatar had no complete right in his person, to intromit or grant licence to this defender as apparent heir to intromit; but his intromission ought to import a behaviour as heir. THE LORDS found the allegiance proponed for the Lord Gray relevant, to free him from that odious passive title libelled, of behaving as heir; but found, that he ought to be liable to the pursuer *in quantum* he had intromitted, to make the same forthcoming to him.

Newbyth, MS. p. 76.

1666. December 16. ALLAN against CAMPBELL.

No 43.

EDINAMPLE CAMPBELL being pursued as representing his father, upon the title of behaving as heir; it was *alleged*, That he intromitted with the duties of the lands condescended upon, by a right to two comprisings against his father. It was *replied*, The comprisings were not expired the time of his father's decease, so that in effect he was heritor.

THE LORDS found, that *gestio* being *magis animi quam facti*, the defender's intromission by virtue of a title did not infer behaving.

Fol. Dic. v. 2. p. 30. Dirleton, No 67. p. 28.

1671. November 23. ALEXANDER RORISON *against* SINCLAIR of Ratter.

No 44.

UMQUHILE William Sinclair of Ratter, being debtor to Alexander Rorison, he pursues this Ratter, as representing his father, to pay the debt, and condescends that he has behaved himself as heir by intromission with the rents of the lands of Ratter, wherein his father died last vest and seized, as of fee, and produces his infestment. The defender *alleged* Absolvitor, because his intromission was upon a precept of *clare constat*, as heir to his grand-father, which was sufficient to purge his general passive title, though it cannot defend against the pursuer in time coming, seeing the defender was *in bona fide*, and knew not his father's infestment. It was *answered*, That he cannot pretend ignorance of his father's infestment, having his writs in his hands, and it is but a mere pretext to immix himself in his father's heritage, without representing him according to law, which would be a common road, if it were once allowed.

THE LORDS repelled the defence, and found the defender liable, as behaving as heir.

Fol. Dic. v. 2. p. 30. Skair, v. 2. p. 8.

1673. January 22.

JAMES CHALMERS Advocate, *against* FARQUHARSON of Inverey, and AGNES GORDON, his Mother.

JAMES CHALMERS having been cautioner for Farquharson of Inverey's father, and forced to pay the debt, did obtain an assignation to the bond, and thereupon pursued this Inverey, as representing the father, upon the passive titles, and the said Agnes Gordon, as vitious intromitter with her husband's goods and gear. The passive title against Inverey, was that he had acquired right to a comprising not expired, and had intromitted with the rents of his father's lands, which was not found relevant to infer a passive title; but it was allowed to the defenders to condescend and produce the comprising, and to the pursuer to prove, *scripto vel juramento*, which being done the pursuer, without intending any new process, might have the benefit of the act of Parliament anent debtor and creditor. It was *alleged* for the said Agnes Gordon, That she could not be liable as vitious intromitter, because she was donatar to her husband's escheat, and thereupon had obtained a decreet of declarator. It being *replied*, That she had intromitted long before her gift, there was litiscontestation in the cause. Probation being led and ready to be advised, notwithstanding whereof, there being several for reforming the allegiance as having proceeded upon wrong information, the procurator did condescend upon this allegiance as relevant, viz. that she being married to a second husband, who had obtained the gift of her first husband. It

No 45.

Found in conformity with No 43. p. 9686.

- No 45. verey's escheat, and thereby had right to the whole moveables that belonged to him the time of the rebellion, she could never be convened as vitious intromitter with her husband's goods which belonged to him as donatar. It was *replied* for the pursuer, that the defence ought to be repelled, *first*, because the donatar's gift was not declared before citation of the defender; *2do*, It was offered to be proved, that she had intromitted with her husband's moveables long before the second marriage with the donatar, which being vitious, ought to make her liable for the debt, and the subsequent right, gotten by a second husband, could defend the same. THE LORDS did sustain the defence, and found, that the apparent heir's intromission within the legal, was no passive title to make him liable to all his father's debt, but that the creditor had only power to redeem, by payment of such money as he did pay to the compriser for his right.

Fol. Dic. v. 2. p. 30. Gosford, MS. No 741. p. 454.

. Dirleton reports this case:

THE LORDS found, that a person being pursued as intromitter, and having alleged, that before the intending of the cause she had obtained a gift of her husband's escheat, the said defence is relevant; and that after intromission, there being an executor confirmed before intending of the cause, or the intromitter obtaining a gift though not declared, there being no necessity to declare the same against herself, that the same doth purge even intromission before the gift. Some of the Lords were of another opinion upon that ground, that *ipso momento* that the parties intromit, there is a passive title introduced against them, which doth not arise upon the intending of the cause, but upon their own act of behaving; and *jus* being *semel quasitum* to creditors cannot be taken from them, except in the case of an executor confirmed before the intending of the cause; against whom the creditor may have action; and that there is a difference betwixt a donatar having declared and an executor having confirmed, in respect the executor is liable to creditors but not a donatar; and an apparent heir having become liable by intromitting with moveable heirship, and behaving as heir, his intromission is not purged by a supervenient gift, seeing his im-mixing is *aditio facto*; and there is *eadem ratio* as to intromiters, who are executors *a tort* (as the English lawyers speak) and wronguously; and in effect by their intromission *adeunt passive*, and are liable to creditors.

Reporter, *Strathurd*.

Dirleton, No 224. p. 105.

. This case is also reported by Stair:

JAMES CHALMERS having become cautioner for Farquharson of Inverey in a sum of money, for relieving of him from under caption, and necessitated to pay the same, pursues his son, and Agnes Gordon his relict, for payment, and

insists against her as vitious intromissatrix with the defunct's whole stock and plenishing; and she having compeared, proponed a defence, denying intromission, and that any intromission she had, was by virtue of a gift of her husband's escheat.

THE LORDS sustained both the libel and defence, and admitted both to probation; and after probation led by the pursuer, the defender gave in a bill desiring the act to be rectified, which by inadvertence of the clerk was extracted otherways than it was proponed and sustained, seeing the act bears the defence to be proponed, that she had obtained gift before her intromission, whereas she neither did nor needed say further, than that she had obtained gift of her husband's escheat, which purged her vitious intromission, unless the pursuer had replied that it was obtained *pendente processu* after his citation; but it is clear the gift was before citation, and hath been found relevant in these terms frequently, and lately; which doth appear by the act itself, wherein the pursuer in his reply offers to prove the intromission anterior to the gift, and the LORDS sustain the defence, without expressing whether anterior or posterior to the gift; so that the act being unclear, the LORDS ought to interpret the same according as in law and justice it might have been sustained, *2do*, Albeit the defence had been expressly proponed and sustained, that the gift had been anterior to the intromission, yet at any time before sentence a distinct relevant allegiance, if instantly verified, is competent; so this defence, that the gift albeit not anterior to the intromission, yet being anterior to the intenting of this cause, it purgeth the vitiosity, which is instantly verified, is relevant and receivable. The pursuer *answered*, That he opposed the state of the process, wherein litis-contestation being made, and probation adduced upon an act of litiscontestation extracted, the same can neither be quarrelled now upon injustice, nor upon any allegiance then competent and omitted, although instantly verified, unless it had been emergent, or at least *noviter veniens ad notitiam*; for an act of litis-contestation is a judicial contract of parties, putting the event of the cause upon the probation therein agreed upon, so that nothing then competent is receivable thereafter, though it were intantly verified; and as to the tenor of the act, it bears expressly, that the intromission was by virtue of a gift, which necessarily imports that the gift was anterior to the intromission; and it will not be sufficient to alter acts upon pretence of the clerk's mistakes, unless the same were proven by the acknowledgment of the Judge, or oath of the clerk.

THE LORDS found that the act not being special and clear as to the time of intromission, that it ought to be explained *in terminis juris*, and therefore found that the defender having a gift before intenting of the cause, although after the intromission, it did purge the intromission in the same way as the confirmation of executors, or declarator of escheat, though obtained by third parties after intromission, but before citation, did exclude vitious intromission, for the gift to the intromitter was effectual without declarator; but the LORDS did not

No 45.

dip upon that point as to distinct exceptions instantly verified after litiſcontestation, albeit competent and known before.

Stair, v. 2. p. 308.

No 46.

Found in conformity with Rorison against Sinclair, No 44. p. 9687.

1685. *January.*

MAXWELL against CORSAN.

JOHN MAXWELL of Barncleugh having pursued John Corsan of Milnehole, as representing Thomas Corsan his uncle, for payment of a debt, and having insisted upon that passive title, that the defender had behaved himself as heir to his uncle, by intromitting with the rents of a tenement of land wherein he died infeft;—*alleged* for the defender, That he stood infeft in the lands as heir to his grandfather, and not as heir to his uncle. *Answered*, That the defender's infeftment, as heir to his grandfather, could not be represented, because Thomas Corsan his uncle, who was the debtor, was infeft as heir of conquest and provision to the grandfather; so that the defender was *in mala fide*, to pass by his uncle and enter heir to his grandfather; especially seeing the time of the defender's service, his uncle's sasine was produced, and instruments taken thereupon in the clerk's hands; and upon that ground, had raised a reduction of the defender's service and infeftment. *Duplied*, That, however that must be a ground to reduce the defender's infeftment, yet so long as it stands unreduced, he must lawfully intromit with the rents, which cannot infer a passive title against him; as also, Thomas Corsan the uncle's sasine is null, being the assertion only of the town clerk, without any warrant. THE LORDS repelled the defence, and found the reason of reduction relevant, the pursuer producing the warrant of the uncle the debtor's sasine *cum processu*, and found the defender liable for repetition *in quantum lucratus*, and assigned a term to the pursuer to prove the defender's possession and quantity of the rent, and to produce the warrant of the uncle's sasine, and to prove that protestations were taken against the defender's service, and that the defender's sasine was then produced.

Fol. Dic. v. 2. p. 30. Sir P. Home, MS. v. 2. Nq 669.

No 47.

A person had two dispositions of his father's whole estate, the one of heritage, and the other of moveables. He having intromitted with the heirship

1707. *July 1.*

INGLIS against ELPHINSTON.

THERE was a bond due by Elphinston of Quarrol to Bruce of Powfoulis, whereto Alexander Inglis writer in Edinburgh has now right, who pursues this Elphinston of Quarrol upon the passive titles; wherein an act being made, there was a clear probation led, that he had intromitted with his father's whole estate, both heritable and moveable, and entered to the possession immediately upon his death, and had likewise meddled with the charter-cest; which coming this day to be advised, Quarrol alleged his father was but cau-

tioner in this debt for one Nisbet, and that he broke the estate by singular titles, viz. a disposition both to the lands and moveables prior to the contracting of this debt, to which he ascribes his intromission and meddling with the charter-chest. *Answered*, This can never purge his vitious intromission, because, before he opened his father's charter-chest, and meddled with his papers, he ought to have obtained the warrant of a Judge, to have inventoried the same, as the Lords found in the case of Innes of Coxton and Duff of Drummore, No 28. p. 9670. *2do*, He has disposed of the visible heirship, which is expressed and contained in none of his dispositions, and so he must be still *passive* liable, especially seeing he possesses 5 or 6,000 merks by year by his father, the debtor in this bond. *Replied*, Where a son has the whole heritage disposed to him, he needs seek no warrant to open the charter-chest, and intromit with the evidents of the lands disposed, as was decided in the case of Urquhart against Sharp, No 31. p. 9673. And as to the second of the heirship, he had two dispositions, one of the heritage, and another of the executry; and certainly it behoved to be carried and comprehended under one of the two, though not *per expressum* and *nominatim* disposed. THE LORDS waved the first anent the charter-chest, as not so clear, and laid hold upon the second anent the moveable heirship; and found it was a separate subject, and not expressly conveyed, and therefore his intromission therewith made him liable *passive*. Some doubted if this would hold, where the debt exhausted both the moveable heirship and the rest of the executry; but others thought, even in that case, his intromission was unwarrantable.

No 47.
moveables,
which were
not expressly
conveyed.
The Lords
found, that
this intromis-
sion made him
liable *passive*.

Fel. Dir. v. 2. p. 30. Fountainball, v. 2. p. 376.

SECT. VII.

An apparent heir discharging or renouncing any right competent to him.

1636. February 24. L. MEIDHOPE against SIR ROBERT HEPBURN'S SONS.

THE general heir of amquhile Sir Robert Hepburn, and the heir of the second marriage, being both convened for payment of a debt owing by their amquhile father to the Goodman of Meidhope; and the general heir offering to renounce, the heir of provision *answering*, That he could not, seeing he had behaved himself as heir to him, in so far as he had granted to his father a discharge of all heirship goods and gear which might befall to him, and which he

No 48.
A presump-
tive heir re-
nouncing in
his father's
favour, his
interest in the
heirship
moveables
will not im-
port behavi-

No 48.

our, though he may have got a valuable consideration for doing so.

might crave through his father's decease, at any time thereafter; and that in respect he had then delivered to him certain moveables and plenishing for his house, he being then to withdraw himself from his father, to his own dwelling a-part after his marriage, accomplished by the advice of his father, whereof albeit the discharge was granted to the father in his own lifetime, yet being given for satisfaction, and for moveables received in place of his heirship, whereto he might succeed, it behoved to be reputed as if he had received and intromitted therewith after his father's decease; this allegiance was repelled, and the discharge given by the eldest son to his father, in his father's lifetime, discharging his father of his heirship, albeit done upon, and for receipt of other moveables, was found ought not to make the eldest son liable to his father's debts as heir, he renouncing now to be heir, which the said discharge was found to make no impediment to him, but he might renounce, albeit he offered not to restore, and make forthcoming to the creditors, the particulars received by him from his father, nor the avails thereof.

Act. *Heriot et Stuart.*Alt. *Nicolson et Nairn.*Clerk, *Hay.**Fof. Dic. v. 2. p. 31. Durie, p. 797.*

1642. February 10. JOHNSTON against JOHNSTON.

No 49.

An apparent heir having ratified an apprising led against his predecessor, and renounced the benefit of the legal, this was found a behaviour.

ONE Johnston convening Johnston the apparent heir to his debtor, as lawfully charged to enter heir to him, for payment of his father's debts; and, the defender renouncing to be heir; the LORDS found, that he could not renounce in respect of this reply, which the LORDS found relevant, viz. that the pursuer offered to prove, that the said defender had bought the defender's father's lands from a compriser, who had sold the said lands and his right of comprising to the Lord Johnston; to which disposition the defender consented, and had received for his consent to the said heritable disposition thereof 10 or 12,000 merks, whereby *res non erant integræ* for him to renounce; especially seeing the time of the said disposition, the comprising was not expired, but the right of reversion was competent to him, which the LORDS admitted to the pursuer's probation in this process. Also, the LORDS sustained another process at this same pursuer's instance against the Lord Johnston, for making arrested goods forthcoming, notwithstanding that this debt was not decerned against the principal party, but was depending *ut supra*; and found, that this pursuit, to make arrested goods forthcoming, might be intended, albeit the said principal cause was not declared *ut supra*; but found, that the said process of arrested goods could not be prosecuted, but should lie over, while the principal cause for the principal debt were first discussed.

Act. ———.

Alt. *Johnston.*Clerk, *Hay.**Fof. Dic. v. 2. p. 31. Durie, p. 891.*

1666. June

SCOTT against THE HEIRS OF AUCHINLECK.

No 50.

The receiving a gratuity for executing a renunciation, which the party might have been compelled by law to grant, and by which creditors were not injured, found not to infer behaviour.

DAVID BOSWEL of Afflect, by contract of marriage with his first Lady, being obliged, in case their should be no heirs male, but female, of the marriage, to provide them to certain portions. Lawrence Scott, as creditor to the deceased Afflect, (having left only daughters) pursues them and their husbands, as they who have renounced to be heirs, yet have gotten satisfaction, from the heir male, of their portions provided to them, at least received sums of money, from the heir male, and that for no other cause, but for granting the renunciation. It was *alleged* for the daughters and their husbands, absolutor, because they renounce to be heirs, and any receipt of sums of money by them in manner libelled, cannot import behaviour as heir; by the contrair, their express renunciation takes away any presumption *et animum immiscendi*; and as to the receipts of sums, *non relevat*, (and it was lawful for them to receive sums from the heir male, *gratuito* for kindness and good offices,) unless the pursuer will say, that the sums received were in satisfaction of the provisions made to them as heirs, by their mother's contract of marriage, which cannot be alledged, seeing the said provisions are entire undischarged, and may be adjudged by the heirs of line against the heirs male, and which heir male is likewise liable to the creditors, for all their debt, though the heirs of line have renounced.

THE LORDS found the allegiance relevant.

Fol. Dic. v. 2. p. 31. Gilmour, No 186. p. 135.

. Newbyth reports this case.

1666. June 16.—In a pursuit at Lawrence Scot's instance, against Boswel of Afflect, for payment of a debt owing by one of his predecessors to the said Lawrence, and the defender being pursued upon the passive titles, as behaving himself as heir, which was referred to his oath, and he having deponed, that he had intromitted with none of the heirship goods, but only his sister having come to his house upon his father's best horse, he did ride upon the same several times to the kirk; and it being questioned whether his riding upon the said horse as it was qualified, did import a gestion; the LORDS were of opinion, for the most part, it did not, and therefore assoilzied the defender from that part of the libel, but found him liable for the debt, upon that member as successor. *titulo lucrativo* to his father, by accepting of a disposition from him, to a clause contained in his uncle's contract of marriage, to whom his father was heir served and retoured, conceived in favour of the heirs male.

Newbyth MS. p. 62.

No 50.

*** This case is also reported by Stair.

1666. *July 5.*—LAWRENCE SCOTT pursues the daughters of umquhile David Boswel of Auchinleck, and the Lord Cathcart, and the lairds of Adamton, and Sornbeg, for a thousand merks adebted by him to the defunct. The defenders offered to renounce. The pursuer replied, they could not renounce, because they had behaved themselves as heirs, in so far as by agreement betwixt them, and the heir male, they had renounced their interest of the heritage in his favours, and had gotten sums of money therefor. It was *answered, non relevat* unless they had so renounced, as to prejudge the creditor, or to assign, dispoise, or discharge any thing they might succeed to, but if they only got sums of money from the heir male, in way of gratuity for their kindness to the estate, and to grant a renunciation voluntarily, as law would compel them, it would not make them liable; and the truth is, that by the defunct's contract of marriage, the estate is provided only to the heirs male, and only 10,000 merks to the daughters. Likeas, the defunct disponed the estate to his brother's son, who adjudged both upon the clause of the contract, and disposition, and the defenders renounced to him as a creditor, in common form.

THE LORDS found that the geting of sums of money, for such a renunciation, by which the creditors were prejudged, did not infer behaving as heir.

Stair, v. 1. p. 389.

1676. *July 19.* NEVOY against LORD BALMERINOCHE.

No 51.

An apparent heir having, after his predecessor's death, ratified a death-bed disposition, the Lords found his getting a valuable consideration for his consent, did not make him liable, he having done no deed tending to convey any right in the defunct, which might have been affected by the creditors.

MARGARET NEVOY pursues the Lord Balmerinoc, as representing the Lord Cowper, to make payment of Cowper's bond; and insists on this passive title, that Balmerinoc is apparent heir-male to the Lord Cowper, and that he transacted with the Lady Cowper, who got a disposition of the estate from her husband, whereby the Lady disponed to him the fee of the estate, and some bonds due to Cowper assigned to her, and Balmerinoc was obliged to deduce an apprising of the estate for debts due to himself by Cowper, and upon other debts of Cowper's; and therefore, having right as creditor, and for all rights he might have by the said apprisings, he ratifies the Lady's right, in so far as it is not disponed to himself, which right was *in lecto*, and defective as being in prejudice of the heir, and this contract imports in effect the heir's consent, and validates the disposition *in lecto pro tanto*; and the Lords have, by their act of sederunt in February 1662, declared, that it shall be a behaving if an apparent heir possess by virtue of an apprising, or an adjudication proceeding upon bonds granted by himself; and in this case it is offered to be proven, that the sums appraised for, or some part of them, are debts due by Balmerinoc as

principal, and Cowper as cautioner, and so is in effect for Balmerinoch's own debts, and he is in possession, and hath nothing else to ascribe his debt to but that apprising; *2do*, Though this condescendence should not make him heir simpliciter, yet it should make him liable *in quantum est lucratus* by the Lord Cowper's disposition.

THE LORDS found, that the getting benefit by transaction could not make an apparent heir liable, unless he had done a deed that might communicate the defunct's right which might have been affected by the creditors; but found that member relevant, that the defender possessed by an apprising deduced, containing debts due by Cowper as cautioner for Balmerinoch's father, to whom he is heir.

1676. December 13 — This cause being heard and decided the 19th day of July last, the defender further *alleged*, That he could not be liable, as behaving as heir, albeit he had right to an apprising led for his own proper debt, though he had intromitted thereby; because the act of sederunt 1662, being a great extension of that penal passive title, ought not now to be made use of, because the motives exprest in that act do cease by the act of Parliament 1661, 'Preferring the defunct's creditors to the creditors of the apparent heir, for the 'space of three years;' and, by the act debtor and creditor, 'Declaring all 'apprisings redeemable if they return to the apparent heir, for what they truly 'paid;' and, if these statutes had been duly considered, the act of sederunt would never have been made, the inconvenience being cured. But there is a great inconvenience to apparent heirs, who must either lose their inheritance, or be liable to all the defunct's debts, though far exceeding the value of the estate; *2do*, The act of sederunt must be strictly interpreted, which is only against bonds granted by apparent heirs after the defunct's death, as being of design to defraud creditors; but here the bonds were anterior to the defunct's death, and gestion being odious, is never understood but where there appears *animus immiscendi*; but here, by the transaction with the Lady Cowper, there is the greatest care taken not to immix. It was *answered* for the pursuer, That the act of sederunt stands in vigour and observance, and is well consistent with the prior acts, all being little enough to secure creditors against the contrivances of apparent heirs to bruik their predecessor's estates, without paying their debts; and the reason of the act of sederunt being against such contrivances, albeit in the narrative it bears, 'That bonds granted after the defunct's 'death by apparent heirs;' it beareth also, 'To be against all such ways.' And, by the contract with the Lady Cowper, there is no care taken not to intromit; but, on the contrary, the right of apprising to be led by Balmerinoch is provided to be disposed to the Lady in corroboration of her other rights, that she may possess thereby; and therefore the defender hath behaved in these points, *imo*, That he hath caused lead an apprising of Cowper's estate for Balmerinoch's own debt, carried on by his own agents, on his own ex-

No 51.

The heir's privilege of challenging a death-bed deed is purely personal.

No 52. penses, which alone, unless he will renounce it, affects the defunct's estate, and imports behaviour; 2do, The ratification in favours of the Lady Cowper, though relating only to apprisings to be deduced, imports behaviour, much more when the Lady Cowper actually possesses, and can defend her possession by no other right, her own right being granted by her husband *in lecto*; 3tio, Balmerinoch hath entered vassals, which is a clear deed of behaviour, if he had no apprising, and if he had for his own debts, it is an intromission, against which the apprising cannot defend him from behaving according to the act of sederunt.

THE LORDS found, that an apparent heir having right to an apprising for his own debt, or assigning the same apprising, doth not import behaviour, if he, or others deriving right from him, intromit not; and found, that the ratification in favours of the Lady Cowper, being only for his right of apprising, did not import behaviour; but found, that if the apparent heir did receive vassals, or uplifted feu-duties, or other duties by himself, or any other deriving right from him, that the same is relevant to infer behaviour, notwithstanding of any apprising to which he hath right, or to his behoof, proceeding upon his own debt; and therefore found, that seeing the Lady Cowper possess, if she could not defend her possession by her right from her husband, as being granted *in lecto*, or being otherways defective, that her possession was to be ascribed to her right from Balmerinoch, and therefore did infer behaviour against Balmerinoch.

Fol. Dic. v. 2. p. 31. Stair, v. 2. p. 454, & 476.

* * Dirleton reports this case :

THE Lord Balmerinoch was pursued, as representing and behaving as heir to the Lord Couper, at the instance of Margaret Nevoy, and diverse other creditors of the said Lord Couper, upon that ground, that he had ratified a disposition, made by the said Lord Couper, in favours of his Lady, on death-bed, and was obliged to comprise the said lands, and to give the said Lady a right to the comprising, to be deduced, that should be preferable to other creditors; and that, by the act of sederunt in my Lord Nithsdale's case*, apparent heirs, granting bonds to the effect their predecessor's estate may be established in their person, or in the person of some confident to their behoof, are liable as behaving; and it was *alleged* for the defender, That behaving is *magis animi quam facti*, and it is evident that the defender did shun to be heir, and did of purpose take the course foresaid, that he should not represent the defunct.

THE LORDS found, that the condescendence was only relevant in these terms, viz. that the defender, or any confident to his behoof, had comprised the said estate for Balmerinoch's own debt, and had possess by virtue of the comprising; or that the Lord Balmerinoch had communicated the right of the said comprising to the Lady Couper, and that she had possess by virtue thereof, and could

* Glendonwyne against Nithsdale, No 84. p. 9738.

not defend herself with her own right, as being *in lecto*, or otherways defective.

It was the opinion of some of the LORDS, that it was sufficient and relevant to say, that Balmerinloch had comprised for his own debt, and was obliged to communicate the said comprising, and had ratified the Lady Cowper's right; for these reasons, *1mo*, The law considers *quod agitur*, and not *quod simulate concipitur*; and the Lord Balmerinloch, by taking the course foresaid, to comprise for his own debt, intends upon the matter *adire*, and to carry away his uncle's estate, to frustrate creditors; *2do*, Though it be pretended that there is a difference betwixt Nithsdale's case and this, in respect, in that case, the adjudication was upon bonds granted by himself after his father's decease, and, in this, the comprising is for my Lord Balmerinloch's debts, contracted before my Lord Cowper's death, the said difference is not considerable, seeing, as to that case, there was a design to carry away the defunct's estate, by a deed of the apparent heir, to the prejudice of creditors, and there is the same in this; *3tio*, Though my Lord Balmerinloch had granted only a ratification, without communicating any right, *eo ipso* he behaved as heir; in respect he had ratified the Lady's right, for any right or interest he had himself; and he had an interest, as apparent heir, sufficient to establish a right in the person of the said Lady, and to prejudge creditors; so that they could not question the same, seeing rights on death-bed being consented to by the apparent heir when they are made, or *ex post facto*, become valid and unquestionable *ex capite lecti*, as appears by the law of the Majesty, concerning rights on death-bed.

Dirleton, No 400. p. 197.

* * * Gosford also reports this case :

1676. *July 25.*—THE Doctor and Thomas Douglas, as creditor by bond to the deceased Lord Couper, did pursue the Lord Balmerinloch, as representing the Lord Couper, the uncle, upon the passive titles, viz. that he was vicious intromitter with the rents of his estate, and that he had behaved himself as heir, by granting a charter to one of my Lord Couper's vassals, with a *de novodamus*. It was *alleged* for the Lord Balmerinloch, That he could not be liable for any of these deeds condescended upon, because he had intromitted by virtue of a comprising led against the Lord Couper's estate, which he had right to; and any charter he had was as compriser, so that the creditors may redeem, but there can be no ground of a passive title. It was *replied*, That the comprising could not defend him, because it was led for his own debts, and not for the Lord Couper's, and, as an apparent heir granting bonds, whereupon being charged to enter to his predecessor's estate, and acquiring right to that comprising, it will not free him from a passive title, as was lately found in the case of the Earl of Nithsdale, No 84. p. 9738., whereupon an act of sederunt was made to make it a leading case, so, upon that same reason, an apparent

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heir suffering a comprising to be led against him for his own debt, albeit prior to his predecessor's death, and obtaining a right thereto, and entering to the possession, he ought to be liable to his predecessor's debts, otherwise, by such a contrivance, the true creditors of the defunct might be disappointed, and his estate applied for payment of other debts than those contracted by himself. It was *replied* to the 2d, That Balmerinoch's comprising being but lately led, and the legal not expired, it could give him no right to grant a charter, with a *de novodamus*, to any vassal; it did necessarily infer a behaviour, having gotten a composition therefor.—THE LORDS did repel the first defence founded upon the comprising, which, after perusal, was found to be only the proper debt of my Lord Balmerinoch, and not for the debt of the Lord Couper; seeing that same reason did militate against his intromitting, by virtue of such a comprising, to make him heir *passive*, as did militate, in the case of the Lord Nithsdale, against voluntary granting of bonds by apparent heirs, that comprising might be led against their predecessor's estate, and right made to them without entering heir, they being both contrivances, of a like nature, to defraud the lawful creditors of their defunct predecessors, and yet to carry away the benefit of his estate. As to the *second* point, of granting a charter with a *de novodamus*, it was not decided, the first being sufficient for a passive title.

1676. December 14.—IN the action betwixt the said parties, wherein there was an interlocutor 25th July 1676, being again called, and the whole debate resumed upon that point, that the Lord Balmerinoch's comprising being for his own debts, could not make him heir *passive*, because it was a lawful title the time of his intromission; as likewise, it being *urged* against him, That he had transacted with the Lady Couper, and had confirmed her right of liferent, which was null of the law, being granted on death-bed; as likewise, that he had entered a vassal, by granting a charter, bearing a *de novodamus*, for which he had gotten composition, and had intromitted with the whole mails and duties of the lands, besides the liferent; so that it was decided in the case of my Lord Nithsdale, No 84. p. 9738., and thereupon an act of sederunt made, bearing, that apparent heirs granting bonds for their own debt, but not their predecessor's, whereupon comprising being led, and they intromitting, it should be a title to infer a behaviour, and make them liable to their predecessor's debt; it was *answered* for the Lord Balmerinoch, That *aditio hereditatis* was *magis animi quam facti*; and, by our law, *quivis titulus etiam coloratus* would defend an apparent heir from being liable for all debts, but only to count for his intromission; so that he having of purpose led a comprising to be a lawful title, it cannot be presumed that he had *animum adeundi hereditatem*; and, for the practise, it could not meet him, because the Lord Nithsdale was not debtor, before he was apparent heir, to any debtor, but did grant bonds after he was apparent heir, of purpose to defraud his predecessor's creditors.—THE LORDS did again renew their interlocutor; and found, that the granting

of a charter for composition, bearing a *de novodamus*, was relevant *per se* to infer a behaviour; as likewise, that he had possessed or granted right to the Lady Couper to possess her own liferent right, being reducible, as granted on death-bed; but, as to the last point, of causing comprise for his own debts, contracted before he was apparent heir, whereby he pretended not to fall under the act of sederunt, I was not decided, but it seems the law can make no difference, seeing the foundation is the same whether the bonds be before or after, viz. that taking an indirect course *animo de fraudandi creditores*, where the defunct had little or inconsiderable debt of his own, whereby they intend to possess their predecessor's estate, which may be great, and frustrate all creditors, by putting them to great expenses of plea, of necessity to compone with them as they please.

Gosford, MS. No 887. p. 568. & No 920. p. 596.

1711. June 28.

THOMAS DICK and WILLIAM ERSKINE against JOHN CARSTAIRS of Kinneuchar.

THOMAS DICK and WILLIAM ERSKINE being creditors in considerable sums to the deceast Carstairs of Kilconquhar, *alias* Kinneuchar, they pursue John Carstairs, now of Kinneuchar, his son, for payment, on the passive titles, and condescended on this act of behaviour, that Mr John Wood having adjudged his father's lands, did, after the legal, sell a part of them to Sir Philip Anstruther; but, in regard his right was looked upon as dubious and insufficient, and he gave only warrandice from his own fact and deed, Sir Philip the purchaser declined to pay an adequate price, or rely on Wood's right; and therefore Carstairs, now of Kinneuchar, gave him a bond of the same date, and before the same witnesses, expressly relative to the minute, obliging himself to deliver to Sir Philip the writs of the lands, to purge incumbrances, to warrant absolutely at all hands, and against all deadly; and, for his better security, to enter heir in certain lands which did belong to his grandfather, to make Sir Philip's warrandice more effectual; and he found Sir William Bruce, his father-in-law, cautioner for performance of the premises; by which deeds it was evident he was the principal disponent, and Wood only a mere name to cover and palliate the contrivance; and that he had plainly meddled with the charter-chest and writs, which was *per se* a sufficient passive title without any more. *Alleged* for the defender, This was one of the nicest passive titles had ever been fallen upon, and it being odious to subject a man to an ocean of debt, where his *animus gærendi* does, not appear, but, on the contrary, a formed design and intention not to represent, his concurrence being merely to do a kindness to his father's creditors, without a sixpence of benefit to himself, Wood having got the price, and purged some preferable writs therewith: But where the

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No 52.

An adjudger, after the legal was expired, sold part of the lands, but his right being doubted by the purchaser, the apparent heir of the debtor granted a bond, obliging himself to deliver to the purchaser the writs of the lands, to purge incumbrances, and to give absolute warrandice. Found that this imported a behaviour.

No 52. apparent heir has no actual intromission, nor any deed of disposal and alienation made, where can this passive title be fixed? Indeed, if any part of the price had come to his pocket, he would not struggle, seeing *pretium succedit loco rei*; but Mr Wood was the sole disponent, transacter, and bargainer, and all the obligations he entered into had nothing dispositive in them, but mere accessories, as to deliver a progress, warrant the right, &c. which are no part of the transmission of the property, but might all be done by a stranger, as well as by an apparent heir, and so can never infer a *gestio pro hærede*, which being a *fictio juris* can go no farther than the reality. So the deeds must be such as are peculiar to him as heir; but if they be common to him and an extraneous person, they can never bind the character of behaviour on him; for that were to make the copy exceed the principal: And so determines the learned Voet, *ad tit. De acq. et om. hæred.* § 6. If an heir apparent do such things as may be acted both *tanquam hæres et tanquam extraneus, non intelligitur in tali casu pro hærede se gessisse*. And as to the having the writs, they were not in his hands, but lying beside Robert Carstairs, his father's writer, so he had no intromission therewith; *et in dubio respondendum est pro reo*. Yea, there be stronger cases which will not infer a passive title, such as the apparent heir's corroborating his father's bond; or even paying one of his creditors will not operate to make him liable to the rest. Next, the taking out briefes to serve heir, if he stop there and do not proceed to perfect it by an actual service; it will not import behaviour, as was found 28th June 1670, Ellis *contra* Carse, No 27. p. 9668. And law requires an actual contrectation and meddling with the *res hæreditariæ*, or a disposing thereon, none of which can be subsumed in this case. *Answered*, That it is not to be expected that heirs lying at the watch to defraud their father's creditors, and yet to draw the emoluments, will do positive direct deeds, but contrive all *per ambages* and interposed persons, as Mr Wood is plainly, and *plus valet quod agitur quam quod simulate concipitur*. And his obligations being *ex incontinenti*, is as good as if ingrossed in the disposition, and makes up the principal part thereof, without which Sir Philip would never have paid the price. And what man in his right senses will believe, that an apparent heir would put himself under such strict obligations of delivering the writs, of absolute warrandice, &c. and get nothing for it? And it is remembered, that, about the year 1666, the Lords found an apparent heir liable for giving a renunciation of his predecessor's estate, as having the force of completing a third party's right, betwixt the heirs of Ord and John Lutfoot, *infra, b. t.* And we are not to consider whether the heir designs a behaviour or not; but we must look to what the law presumes, which Paulus *L. 9. D. De acq. et omit. hæred.* very well explains, *si is qui bonis paternis se abstinuit per suppositam personam bona patris mercatus fuerit, perinde eum convenire oportere a creditoribus ac si bonis paternis se immiscuisset*. And it holds just as well in the selling his father's heritage by an interposed person, as it does in buying it; and it is plain Mr Wood was nothing but a cloak and cover to his fraud.

And whereas it is *contended*, Wood was the sole disponent, bargainer, and transacter; it was *answered*, There is a flood and torrent of words, but little thought, verity, or sound reasoning; for Wood only conveys some lame rights; and saves himself by giving no warrandice but from fact and deed; whereas the thing that completes the right is the apparent heir's engagements, without which the purchaser would never have bought them; so it is a plain contrivance to palliate the fraud.—THE LORDS, by plurality, found the apparent heir's granting the bond of the tenor foresaid imported a behaviour; but, on a reclaiming bill, the Lords ordained the case to be farther heard.

1712. July 8.—ERSKINE and Dick *contra* Carstairs, mentioned *supra* 28th June 1711. The deceased Captain Carstairs of Kilconquhar being debtor to Mr William Erskine, Governor of Blackness Castle, William Erskine, his son, pursues John Carstairs, the Captain's son, for payment on the passive titles, which they qualify thus: That Sir Philip Anstruther being to purchase a part of the Captain's lands, the contrivance was, that Mr John Wood, a creditor-adjudge, should be the disponent, not simply as absolute proprietor, but as having right to several adjudications, and who would give no other warrandice but only from his own fact and deed; therefore to make up a complete right to Sir Philip, the buyer, Kilconquhar, the apparent heir, grants a backbond of the same date, and before the same witnesses, with Mr Wood's minute, obliging himself to exhibit and deliver a sufficient progress of the writs of the lands, to purge incumbrances, and to be bound in absolute warrandice, to free the purchaser of all minister's stipends and public burdens preceding his entry; and to make his warrandice more effectual, he obliged himself to enter himself in feft in an estate descending to him by his uncle, and found Sir William Bruce cautioner for that effect. From which premisses the argument of his representing *gestione pro herede* was pushed thus: Wood was only an interposed name, Kilconquhar was the only true disponent, as being the chief obligant in all the material and essential clauses of a sale or alienation, viz. absolute warrandice, delivery of the writs, (which imported his intromission with the charter-chest) and purging incumbrances, which proved that the price was converted to his utility, being to free and disburden the lands; and accordingly the purchaser got the writs, and is now in the peaceable possession of the lands, who would never have relied on Wood's right, unless Kilconquhar, the apparent heir, had interposed; and he alone gave the finishing stroke to the perfection and consummation of the right, so there cannot be a clearer behaviour. *Alleged*, This passive title of *gestio* requires two things; 1^{mo}, *Animus adeundi et immiscendi*; and 2^{do}, Actual contrectation and immixtion, none of which appears in this case; for his design was both laudable and honest, to have his father's debts paid out of the sale of his own lands; and no lawyer can pretend, that an apparent heir's paying any of his predecessor's creditors

No 52.

voluntarily, subjects him to a passive title *quoad* the rest, and all this arguing is from remote inferences and implication; but passive titles must be inferred from direct positive deeds, according to their definition of being a disorderly illegal immixtion, which implies actual contrectation, whereas not one farthing of the price came to Kilconquhar, but all to the creditors; and Wood is the direct disposer, and the apparent heir only concurs for the purchaser's farther security. It is the proprietor's will by the dispositive clause that only transmits the property. The other clauses of warrandice, writs, and incumbrances, are only accessory, and such as may be undertaken by extraneous persons, who neither by apparencey or otherwise, have any right to the subject; and nothing can infer a behaviour but deeds proper *tantum modo* to an heir, and not such as be common to be done either by them or strangers, as the learned Voet *ad tit. De acquir. vel omit hered.* distinguishes. For if the fact be applicable to any other consideration, it is juster to land it there, than in an unfavourable legal penalty of a passive title; and thus the LORDS have explained it, 5th July 1665, Scot *contra* Auchinleck, No 50. p. 9693., where it was found, that a simple renunciation granted by an apparent heir of all pretence or claim he had to the estate, if it did not contain a conveyance of the right, did not infer the passive title of behaviour, even though the apparent heir got a gratuity for his kindness, and so a willing renunciation; and the like was found, July 19th 1676, Nevoy *contra* Lord Balmerino, No 51. p. 9694; and Spottiswood, tit. HEIRS, says, *gestio pro herede* is more *animi quam facti*; and one cannot incur behaviour *sine animo gerendi*. And here, there being no design to pre-judge creditors, but rather to pay them, it were beyond measure hard to open a door, not only to pay the debt pursued for, but to let in a flood of creditors far beyond the value of the estate, against one who innocently interposed, and got no part of the price. *Answered*, There have been so many inventions contrived for apparent heirs enjoying their predecessor's estate, and yet defraud the creditors, so that no country has taken more pains to obviate them than Scotland; and allow this once, adieu to the passive titles, for such as Mr Wood shall be a cover to heirs to possess, a cover to acquire in titles, a cover to convey to confident trustees, and all for the apparent heir's behoof, who then may safely undertake all the substantial parts of the transmission; but our law cannot be so defective in remedying such palpable frauds, and the intromitting with a charter-chest is a gross behaviour; and though they came by Robert Carstairs, his father's agent, yet he was but a hand; and *qui per alium quid facit per se facere videtur*. And however the old decisions run, that a renunciation for money did not infer a gestion; yet of late, in the case of Lawrence Ord and John Lutfoot, *infra b. t.*, such a renunciation without a conveyance made him liable. THE LORDS found Kilconquhar's obligation to exhibit a progress, to purge incumbrances, and to be liable in absolute warrandice, with the actual delivery of the writs, inferred the passive title of behaviour. Some of the LORDS preferred a temperament, that it should not make him uni-

versally liable, but only *in valorem*, because of the straitness of the case, but this was waved, and dropt at this time.

Fol. Dic. v. 2. p. 31. Fountainhall, v. 2. p. 652. and 750.

* * * Forbes reports this case.

THOMAS DICK pursued John Carstairs of Kilconquhar, as representing his father, Captain William Carstairs of Newgrange, for payment of a sum in his father's bond, and insisted upon the passive title of behaviour as heir, in so far as Mr John Wood, minister of St Andrews, having by a minute of sale, narrating, That there were in his person several adjudications of the lands of Newgrange, wherein the defender's father died infest, obliged himself to dispoise these lands in favours of Captain Anstruther, with warrandice from fact and deed; and *per verba de presenti*, assigned and disposed for an adequate price to be paid to him; the defender, by a separate writ of the same date, signed before the same witnesses with the minute, and expressly relative thereto, did, for Captain Anstruther's further security, oblige himself not only to exhibit and deliver to him a valid and sufficient progress of the writs of the lands betwixt and a certain day, but also to warrant Mr Wood's disposition at all hands, and against all deadly; nay further, particularly bound himself to purge the lands of certain incumbrances named; and to capacitate him the better to implement, he, as principal, and Sir William Bruce, his father-in-law, as cautioner, obliged themselves, that the defender should enter, and infest himself in the barony of Kilconquhar, as heir to John Carstairs, his uncle: Which procedure was a manifest behaviour in the defender, as heir to his father; he being in effect the true dispoiser of his father's heritage, and Mr Wood's name used but as a cover to elide the passive title. For though the minute bears the price payable to, and discharged by him, law and common sense presumes it was not paid at that time, nor ever paid to Mr Wood; because, there remained a great deal to be performed on the dispoiser's part, as the purging incumbrances, granting a disposition, delivering of writs. Now why would the defender so anxiously have undertaken an absolute warrandice to get money for Mr Wood, who did only oblige himself to warrant from fact and deed? There is nothing more natural to suppose, than that he who receives the price should warrant the purchase, and consequently, that he who warrants the purchase, hath received the price. Besides, the defender may be charged to enter heir upon his obligation of absolute warrandice, and so by his deed only succeeding heirs are debarred.

Alleged for the defender, Mr Wood's adjudications being expired, the absolute right without any reversion was stated in his person, so that none but he could dispoise. And there could be no behaviour as heir by the defender's entering *tanquam quilibet* into these accessory obligations to warrant and make good the progress for encouraging the purchaser, out of kindness to the credi-

Ne 52.

tors, which any stranger might have done as an interposing friend or cautioner; for nothing but intromission with the rents or writs can infer a behaviour.—
2do, To evidence how loth the Lords have been to extend this passive title, apparent heirs renouncing all claim they had in favours of persons to whom their predecessors had disposed, was found to be no behaviour, though they got some gratification for so doing; because, they transmitted no right, July 5. 1666, Scot *contra* Heirs of Auchinleck, No 50. p. 9693; July 19. 1676, Nevoy *contra* Lord Balmerino, No 51. p. 9694; and the defender received no gratification, nor any part of the money. Again, the taking out briefes without actually serving heir, is not sufficient to import behaving, June 28. 1670, Elies *contra* Carse, No 27. p. 9668, though this discovers *animus ad eundem*. All which is exactly conform to the common law, *Voet. Comment. in Pandect. Tit. De acquir. et amit. Poss. § 6.*

Replied for the pursuer, Though intromission with writs and rents be the most open and usual, they are not the only acts of behaviour, in so far as the property is more valuable than the rents; and if apparent heirs should be allowed to dispoise safely in such a subtle affected way *in fraudem legis*, creditors shall be no longer secure by the passive title. And in the case of ——— Orr, daughter to Lawrence Orr, and Walter Graham, against the Creditors of the said Lawrence Orr, *infra, b. t.* an apparent heir's renunciation, being upon the matter a conveyance, was found to make the heir liable *passive*.— Such an obligation granted by an apparent heir differs from the like granted by a stranger, in that the latter doth not operate a conveyance of the property, but only secures the purchaser against any damage arising through defect of the right; whereas an apparent heir's obligation of that nature turns to a conveyance of the property, in so far as the purchaser might thereupon have adjudged the lands from him upon a charge to enter heir in implement of the warrandice, and made them as much his own irredeemable, as if the apparent heir had disposed them.

THE LORDS found the defender's granting the bond, of the date of the minute, imported a behaviour as heir to his father; and thereafter, July 4. 1712, upon a new hearing and report, the LORDS again found, That the defender's granting the bond of the date of the minute, with the delivery of the writs by one James Carstairs, who received them from Robert Carstairs, the defender's father's agent, imported a behaviour. For the LORDS presumed the writs were so delivered in consequence of the defender's obligation to deliver them; by doing whereof, Robert or James Carstairs, as his *negotium gerens*, freed him of his obligation.

Forbes, p. 496.

S E C T. VIII.

Acts of the Heir proceeding from his Connection with the
Predecessor.1609. Feb. 23. & 1610. Jan. 23. HENRYSON *against* SINCLAIR.

No 53.

In an action of transferring, pursued by James Henryson, as heir to Marion Sinclair, his mother, who was only daughter and heir procreate betwixt Edward Sinclair of Drydane and Margaret Ramsay, his first spouse, daughter to David Ramsay of Bangour, against John Sinclair, his father, who was heir or successor to the said Edward Sinclair, procreated upon Beatrix Renton, his second spouse, which Edward was heir or successor to Sir William Sinclair, his father, party contractor, to hear and see the (contract) matrimonial made betwixt the said Sir John and Edward, his son, on the one part, and the said David Ramsay and his said daughter on the other part, and registered in the official's books of ———, 10th April 1618; whereby Sir John was obliged to infest his said son and future spouse in the most half, at the least the best half of his lands of Lesswood, Piccars, and Drydane; the LORDS found Edward Sinclair to be successor *titulo lucrativo* to Sir John, his father, by accepting the infestment contained in the said contract of marriage.

*Kerse, MS. fol. 141.*1610. November 20. MASTER of BOYD *against* LORD CAMPBELL.

No 54.

AN apparent heir of ward lands will get modification for his aliment, albeit he be not served heir; but the pursuit of that action will make him heir. In the estimation of the rental, the LORDS will not only consider the yearly duty of mail and farm, but also the entries and grassums which the donatars to the ward have gotten from the friendly tenants, because, in many parts of the country, the grassums are great, and the yearly duty very mean.

An apparent
heir of ward
lands who
gets an ali-
ment modified
to him, is
thereby sub-
jected to the
passive titles.

Fol. Dic. v. 2. p. 32. Haddington, MS. No 2002.

. A similar decision was pronounced 12th February 1635, Hepburn *against* Seaton, No 1. p. 381, *voce* ALIMENT.

1612. January 31.

HOME *against* HOME.

In an action of spuilzie of the teinds of Hounthowood, pursued by George Home of ———, *contra* Alexander Home of Hattonhall, upon a tack acquired

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by William Home, his father, to himself and the said George, his son, in fee, and the heirs of the longest liver, for nineteen years, the Lords found, that George was successor to his father by his tack, and obliged therefore to warrant the defender, to whom their father made right to their teinds before the date of the tack.

Kerse, MS. fol. 141.

No 56.

1622. March 25.

LORD SEMPLE *against* HAY.

AN apparent heir of a nobleman assuming his predecessor's titles is not a behaviour.

Fol. Dic. v. 2. p. 32. Erskine, MS.

*** Auchinleck reports this case.

1633. December 21.—JOHN HAY of Tourlands pursues my Lord Semple as heir to his father, in so far as after his father's decease, he behaved himself as heir, in riding in Parliament and for succeeding to his father's honours; which was repelled, seeing Semple was in fee of the lands before his father's decease, reserving only his father's liferent. This interlocutor was pronounced 20th March 1623, and a bill given in for an extract thereof at Semple's instance 21st December 1633.

Clerk, *Hay.*

Auchinleck, MS. p. 7.

No 57.

1627. January 24.

GLENKINDIE *against* CRAWFORD.

THE passive title was not sustained upon a person having in a writ designed himself as heir, and professed himself to be heir, not being *in re hæreditaria*.

Fol. Dic. v. 2. p. 23. Durie.

*** This case is No 25. p. 6869, *voce* INDUCIAE LEGALES.

*** The same was found 8th July 1628, Dunbar *against* Leslie, No 15. p. 5392. *voce* HEIRSHIP MOVEABLES.

1629. July 16.

MURRAY against ROSS, CHALMERS against BOSWELL, and WHITELAW against RUTHVEN.

No 58.

Proposing a
defence of
payment is
not such a
gestio as to
make the de-
fender liable
in another
process.

WALTER MURRAY pursued an action of registration against Walter Ross, as behaving himself as heir to his father, by payment of his debt, in so far as John Monro having obtained a decret of registration against the defender as lawfully charged to enter heir to his father, and having charged him thereupon, he suspended upon a reason of payment made by his father to John Monro, which he referred to John's oath, and next he offered to renounce. In which suspension the term was circumduced for not producing the renunciation, and likewise the letters were found orderly proceeded, in respect the charger declared that Walter's father had made him no payment. In respect of this exception of payment, in proving whereof the defender succumbed, the pursuer contended he was heir to his father *in sempiternum*, especially he having made payment conform to the said decret of suspension. *Replied*, These sentences being recovered against him only as lawfully charged to enter heir, the furthest they could work was only in favours of the obtainers of the decret, and for payment of the debts therein contained, but could never work in favours of the pursuer, who was a third party. *Duplied*, The exception of payment and sentence following thereupon, he compearing and succumbing, makes him heir to all the world, that had any just action against him. THE LORDS found that it were hard to make a man heir for payment of his father's debts, and so assoilzied him from that action.

1631. January 26.—THE like was adjudged betwixt James Chalmers of Gargirth and David Boswell of Auchinleck, against whom he sought to have a bond of 1000 merks transferred as heir to his father by intromission with his heirship goods, for proving whereof he produced a decret given against him for null defence, and could only work in his favours that obtained it; but now against this pursuer he would allege that his father was such a person that could not have an heir. The exception was sustained and received.

1630. July 10.—The same was found betwixt Patrick Whitelaw and the Laird of Ruthven, That a decret obtained at a party's instance against another as lawfully charged to enter heir, can work in no other's favours but only his that obtained the decret.

Fol. Dic. v. 2. p. 32. Spottiswood, (HEIRS.) p. 141.

* * The first of these cases (Murray against Ross) is reported by Auchinleck :

1629. July 16.—If a decret be obtained at the instance of a creditor against an apparent heir charged to enter heir, the decret will not prove him to

No 58. be heir if he be pursued at the instance of a third person, but he must first be charged *de novo* to enter, as was done by the other party.

Auchinleck, MS. p. 4.

* * The same case is also reported by Durie :

THE defender being charged for payment of his father's debt, as behaving himself as heir to him, *hoc medio*, in so far as he being lawfully convened to enter heir to his said father by another creditor, in that process he appeared and took a day to renounce to be heir, and at the term assigned thereto having failed to produce a renunciation, decret is given against him, and the same decret being thereafter suspended upon a reason alleged by him, bearing payment to have been made by his father of the said debt, wherein having succumbed, the letters were found orderly proceeded against him, for obedience whereof he had paid that debt, whereby he had behaved himself as heir; but the Lords found, that this proved him not to be heir, and that sentence could not be given against him in any matter betwixt other parties, besides those contained in the former sentence against him, wherein he being only decerned as lawfully charged to enter heir, that decret so given was found would not prove in any other process against him, but that the like charges to enter heir ought to be used by any person who would pursue *super hoc medio*, neither did the succumbing in that reason of suspension, or the preceding failzie to renounce, or payment conform to the sentence to the creditor, make him liable to other creditors, as if he had behaved himself as heir to his father.

Act. ———

Alt. Gibbon.

Durie, p. 463.

* * Whitelaw against Ruthven is also reported by Durie :

1630. July 10.—THE Lord Ruthven being pursued by the said Patrick, to pay his father's debt, as lawfully charged to enter heir to him; who offering to renounce, and the pursuer *contending*, That he could not be heard to renounce, because there was a decret obtained against him, as charged to enter heir at another creditor's instance of before, which decret standing unsuspended or taken away, behaved so to work against him, that he could never be heard to renounce to any other creditor so long as that decret stood; for if this were permitted, that he might renounce against one creditor, and let sentence pass against him in favours of another, as lawfully charged to enter heir, by collusion, or favour of preferring one to another upon any other respect, then he might take back again upon such conditions as the parties could agree upon, the land which the creditor whom he favours should comprise for a debt possibly not owing, and bruik the same to the prejudice and defraud of other creditors, which were unjust; notwithstanding whereof, it was found that he

might renounce, for the foresaid inconvenience was not to be respected; seeing an adjudication upon a party's renunciation to be heir, is more summarily expedite than a comprising upon a sentence against the party as lawfully charged; seeing there must another special charge precede before comprising, which is not needful in adjudications; and if there be any collusion or unjust ground of the sentence, or no just debt, the parties interested thereby have action of the law against the same.

Clerk, *Gibson*.

But the same day, in a process wherein Hay was clerk, a sentence betwixt a defender and another pursuer, obtained against this same defender convened as intromissatrix to pay her husband's debts, proceeding upon lawful probation wherein she was proved intromissatrix, was sustained in this process to prove her intromissatrix, she being so convened by another creditor; and it was not found necessary to prove her intromissatrix *de novo* again; but this sentence, as said is, proceeded upon probation by witnesses; whereas if it had proceeded upon contumacy to give her oath, it could not have proved out of that process betwixt other parties. See RENUNCIATION TO BE HEIR. RES INTER ALIOS.

Durie, p. 529.

* * * Chalmers against Boswell is also reported by Durie :

1631. *January 26.*—L. GADGIRTH pursuing the L. Affleck, for transferring of a bond registrate against his father in the defender, as behaving himself as heir to him by intromission with his heirship goods, and for verifying thereof, produces a decret given against him at another party's instance, *hoc nomine* as behaving himself by the said intromission with the said heirship goods as heir, which being proved in that process by sufficient probation of witnesses, and so found and decerned, that decret standing unreduced, the same must prove him heir in all other processes pursued against him *eo nomine*; and the defender *alleging*, That that decret cannot prejudge him, but in that process only, where it is so found, and cannot prejudge him of his defence to allege here, or in any other action, that his intromission cannot make him heir, because his umquhile father being such a person that in law would nor could have any heir, which was not proponed in that process wherein he compeared not, and decret was given against him then absent;—the LORDS found that that decret, albeit done upon probation, should not prove the defender heir *extra illum processum*; and therefore permitted the defender to purge that alternative, whereby he was convened as behaving himself as heir; which the LORDS found he might do, notwithstanding of that sentence; for, seeing he might reduce that sentence, if there was reason so to do, against the obtainer thereof, much more might he oppone that reason by way of exception against another party, user of the same against him; and, albeit that decret, while it stands,

No 58. might prove the defender to have intromitted with these goods, which might have been heirship goods of any person, who in law might have an heir, yet the same will not thereby prove him heir, if he may qualify that he was not that person who might have an heir, albeit he had intromitted therewith.

Act. Miller.

Alt. Nicolson.

Clerk, Gibson.

1631. July 13.—THE deceased L. of Affleck, as cautioner for the L. of Lesmore, being debtor by bond to one Campbell in 1000 merks, the right of which addebted bond, by progress, being assigned to Gadgirth, he pursues transferring *active* in himself, and *passive* in this Laird of Affleck, as behaving himself as heir to his umquhile father, by intromitting with his heirship goods; and the defender *alleging*, That he could not be convened *hoc nomine*, because his father when he died was not that person who could have an heir, seeing he was not then prelate, baron, nor burgess; for he was lawfully denuded of the property of all his lands before his decease in the defender's favours without any reservation of his liferent; and the pursuer *replying*, That notwithstanding thereof, he ceased not to be a person who might have an heir, seeing he offered to prove that his said umquhile father retained the possession of all his lands to the hour of his decease, notwithstanding of the right made to his son; likeas, the defender acknowledged him to be such a person as might have an heir, and that he was his heir, in so far as, immediately after his father's decease, he and the rest of the defunct's bairns, having intromitted with the whole moveables, the defender then put apart and distinguished the moveable heirship from the rest of the moveables, and the rest of the bairns intromitted with all the rest except the heirship; which heirship so distinguished, was intromitted with then by the defender's self, which being then done by him being *major et sciens*, makes him liable as heir; likeas, there is a decret standing obtained against him, albeit at another party's instance, as behaving himself by intromission with his father's heirship proved in that sentence; and the defender *alleging*, That this intromission forssaid with goods cannot be found as intromission with heirship where the owner was not a person who might have an heir in law for the reason alleged; but the most he could thereby be subject in, was to make the same forthcoming to the creditor, and not to make him liable to all the defunct's debts; and the decret ought not to be respected, being given against him, not compearing; and now he compears and propones this defence, which would have elided that pursuit; and this is a decret at the instance of another party, which cannot prove at the pursuer's instance nor work in his favour;—the LORDS, nevertheless, repelled the exception in respect of the reply, which they admitted to the pursuer's probation and to be proved *conjunctim*; for they found the father's retention of possession, and the eldest son's separating and meddling with the heirship *scienter*, when he was major, and the decret forssaid standing upon probation,

was enough to make him liable for his father's debt, as he who had behaved himself as heir. See RES INTER ALIOS.

No 58.

Act. Stuart.

Alt. Nicolson & Gibson.

Clerk, Gibson.

Durie, p. 559. & 595.

1672. July 30.

FOWLIS against FORBESSES.

ROBERT FOWLIS Bailie of Edinburgh, having obtained decret against the three daughters and heirs-portioners of Mr William Forbes, advocate; one of them being married to Mr John Strachan, suspends, and *alleges* that she does not represent her father; and, albeit there be produced a right granted by her to Tolquhoun of her proportion of her father's lands, and of all right she can succeed to, and that he is obliged to relieve her of all debts she can be liable to, and hath given her bond for 3000 merks, yet there hath nothing followed thereupon; for neither is she infest as heir-portioner, nor Tolquhoun infest, nor hath he paid her any money, but suspended; *2do*, Albeit she were actually heir-portioner she can only be liable for the third part of the debt. It was *answered*, That she having disposed her father's heritage, and gotten bond for a sum of money therefor, she has unquestionably behaved herself as heir, and hath apprised Tolquhoun's land upon the 3000 merks; and therefore should be liable, not only for her proportion, but in so far as the benefit of her succession reacheth to, and she may pursue the rest for her relief, rather than put the pursuer, who is a stranger and a creditor, to divide his action or execution against many heirs-portioners.

THE LORDS found the suspender liable upon the rights betwixt her and Tolquhoun for her third part of this debt, as one of the three heirs-portioners; and declared, that if the pursuer using diligence, should not recover payment through their insolvency, the Lords would take it into consideration, how far the suspender should be liable more than for her third part.

Fol. Dic. v. 2. p. 31. Stair, v. 2. p. 114.

1675. January 20.

CARFRAE against TELFER.

No 60.

A PERSON being pursued as representing a debtor, upon that passive title, that he had behaved himself as heir to the defunct, in so far as, being convened at the instance of another party, he had proponed a peremptory defence; the LORDS found, That the proponing of a defence upon payment or such like, was

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An apparent heir disposed his father's lands, taking the disponent bound to relieve him of debts, for which the disponent granted him bond for a certain sum. This was found a behaviour, though nothing followed thereupon; neither the apparent heir having been infest, nor the bond paid.

No 60. not such a deed as could infer the passive title of behaving, unless it were administered with intromission or otherwise.

Reporter, *Newby*.

Clerk, *Hamilton*.

Fol. Dic. v. 2. p. 32. Dirleton, No 223. p. 104.

* * * Stair reports this case :

1675. *January 21.*—JAMES TELFER, as assignee to a disposition granted by Mr John Corsan, pursues John Corsan, his oye, for implement thereof, and insists upon this passive title, that the said John Corsan being pursued by another creditor of his goodsire's, did propone a defence of payment and made litiscontestation thereupon, and at the term assigned failed in probation, and so was decerned, which a behaving as heir, and an owning and immixtion in the inheritance; seeing in all processes against apparent heirs, if they propone payment, they liberate the pursuer from proving the passive titles; because by proponing upon the defunct's right they behave as heirs. It was *answered*, That albeit custom hath exempted pursuers from proving the passive titles when the defenders proponed payment, because they ought not to delay the pursuer, if they will not represent; yet that never was, nor can be extended as a general passive title to other processes.

THE LORDS found the condescendence upon this passive title, as aforesaid, not relevant.

Stair, v. 2. p. 307.

* * * This case is also reported by Gosford :

IN a pursuit at the said James's instance against John Corsan, for implement of a disposition made to his father, upon this passive title, that he being pursued by other creditors of his father's as representing him, he did propone peremptory defences of payment, for not proving whereof he was decerned; it was *alleged*, That albeit he had proponed peremptory defences against another creditor, which, if he had succumbed to prove, would infer a passive against him to make him liable for that debt; yet that being *res inter alios acta*, and he not being liable upon any of the passive titles, could not be extended to another, unless they could condescend upon some other passive title of behaviour. THE LORDS did sustain the defence, and found that the title of behaviour as heir, not being any otherwise offered to be proved than by proponing a defence in one process, ought not to be extended against the apparent heir, to make him liable to his predecessor's whole debts due to other creditors against whose titles he proponed no defence at all;—the only reason of finding him liable upon proponing of a peremptory defence being, that thereby he secluded that creditor pursuing from having a present decret whereby he might

affect the debtor's estate by a comprising or adjudication upon the apparent heir's renunciation; which reason could not be pretended by this pursuer, to whom he was willing to grant a renunciation, so that he ought to condescend upon a passive title if he would have him personally liable.

Gosford, MS. No 739.

No 60.

1698. December 13. JOHN MOFFAT *against* BROWNS and AITCHESON.

No 61.

A feu-charter granted to a young man in contemplation that his predecessors had been rentallers of the lands, found not to infer behaviour.

MOFFAT pursuing mails and duties of a tenement and croft of land in Kelso, as being infeft on a feu-charter flowing from the Earl of Roxburgh; they defend with a wadset from his father. He repeats a reduction, that it was *a non habente potestatem*, his father being never heritor, but only a kindly rentaller during his life. They oppose a pursuit at their instance against him, as representing his father on the passive titles, and so was bound to warrant his father's deed; and the passive title insisted on was, that he had got the feu-charter from the Earl, his superior, in contemplation that his father and predecessors had, past all memory, been kindly rentallers in that land; and so he having got this benefit by his father, he ought to represent him. *Answered*, His father's right was only a precarious rental, and at best expired with his life; and so the continuation of his son's possession, or the narrative of his charter, imports no passive title, especially seeing it bears payment of sums of money, besides the kindliness. THE LORDS were clear this could never infer a passive title. But some of them thought, if a rentaller's son get a feu for paying 500 merks, which the superior would not have granted to a stranger under L. 1000, in that case, though he could not be liable personally, yet the land might be affected *in quantum erat lucratus*. The President was of a contrary opinion; but this was not decided. There was another ground insinuated, viz. that the Earl had entered into a contract with his rentallers to grant them feus at such a rate, and that Moffat's father was one of them. This the LORDS thought relevant; for then his father was a feuer upon the matter, and he succeeds to him therein; but the LORDS appointed them to be farther heard upon this.

Fbl. Dic. v. 2. p. 31. Fountainhall, v. 2. p. 24.

1715. June 23.

JAMES FORRET *against* The REPRESENTATIVES of JAMES CARSTAIRS.

No 62.

The proponing the peremptory defence of prescription found to infer acknowledgment of the passive titles.

In a process of aliment at the instance of Forret against the Children of Bailie Carstairs, as representing Mr Thomas Finlay, schoolmaster at Drumeldrie, whom the pursuer, who kept a public boarding-house, had entertained several years; these three points coming to be discussed, viz. 1^{mo}, How far

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aliment is due for a major without paction? *2do*, From what time the three years prescription of such processes does commence? *3tio*, Whether the proposing prescription does infer acknowledgment of the passive titles?

And it was, as to the *first* of these, *answered* for the defenders, That it is an uncontroverted principle, that no action for alimentering a major can be intended, except upon paction; seeing it is presumed to be done out of friendship, or some other respect; otherwise it is presumed that he paid for his entertainment at the time.

Replied for the pursuer; That there is an exception set down immediately after that rule by my Lord Stair, Lib. 1. Tit. 8. viz. 'Unless it be in such houses where they usually aliment for money;' and that because in this case, the weightier presumption overbalanceth the weaker. And this exception is founded on an express act of Parliament, James VI. Parl. 6. cap. 83.; for there mens ordinaries, not founded upon writ, are to be pursued for within three years, otherwise no probation allowed, except by oath of party; *ergo a contrario sensu*, where a party can neither prove by writ nor oath of party, mens ordinaries can be pursued within three years.

Duplied for the defenders, That though mens ordinaries may be pursued within three years, without founding either upon writ, or offering to prove by oath of party; yet still it remains necessary that the pursuer found on a paction, which in that case he may prove by witnesses. Mens ordinaries, in the act of Parliament, signifies plainly their entertainment, and is not confined simply to that sense we generally take the word in, when we say, 'Such a man keeps an ordinary;' and therefore, if the pursuer's sense of the law were taken, any person, though neither cook nor vintner, might pursue those to whom they had given meat and drink within three years, as well as cooks and vintners, which would entirely evacuate the rule anent aliment due only *ex pacto*.

As to the *second* point, *answered* for the defenders, That the pursuit can go no further than three years, immediately preceding the citation; because, in the act of Parliament, anent the three years prescription, mens ordinaries are expressly mentioned. And in the other prescriptions of that same nature, though the obligations continued for more than three years, yet the LORDS have always restricted the pursuit to three years preceding the commencement of the process, as in the case of servants fees, 12th February 1680, Ross *contra* Master of Salton, *voce* PRESCRIPTION; and the *ratio decidendi* given by the Lord Stair is, That it is to be presumed that servants fees being for their necessary provision, must be frequently paid; which reason, in the present case, holds much stronger.

Replied for the pursuer, That the specialty here is, that the present process is not against the person himself, but his Representatives; and therefore the interval from his decease to the time of raising of the process, cannot be reckoned any part of the three years; but in this case, the three years which the law presumes may be owing, or rather the time at which he ceased to be alimentered; for the process could not well commence sooner.

As to the *third* point, *answered* for the defenders, That though proponing peremptory defences generally exempts the pursuer from proving the passive titles, yet where either dilatory defences are proponed, or objections against the relevancy of the libel, here there is no right peculiar to the defunct assumed, (as in the case of proponing peremptors) it being proper for any man to say, that either he is not legally cited, or not before a proper judge; or that the facts libelled upon do not infer the conclusion. And of this last sort is the present defence, viz. that the defunct's having barely dieted with the pursuer, did not infer an obligation upon him to make payment, and that necessarily the same continued yet due, unless the pursuer libelled a positive paction, and that the samen was yet resting owing; for this is properly not so much a defence, as an objection against the relevancy of the libel.

Replied for the pursuer, That as the proponing prescription is undoubtedly a peremptory defence, so there is no principle of our law better established than this, that such a defence cannot be proponed, without acknowledging the passive titles; for how can a defender propone a defence competent to his predecessor, without acknowledging that he represents him?

THE LORDS repelled the defence, That there was no paction; and found an aliment due three years before the citation: and found the defender cannot propone prescription, without acknowledging the passive titles.

Act. Graham.

Alt. Jo. Falconer.

Clerk, Gibson.

Bruce, v. 1. No 106. p. 131.

No 62.

1717. July.

WILLIAM WILSON *against* The CHILDREN and HEIRS of ALEXANDER SHORT,
Merchant in Stirling.

JAMES SHORT made a disposition of his heritage, upon death-bed, to Mary Scot his mother, in prejudice of Alexander Short his eldest brother and heir; and the mother afterwards conveys her right in favours of her grandchildren the Lord Salin's daughters, under this condition, 'That in case of heirs of her eldest son Alexander's own body, Salin's children should denude in their favours.' In the mean time, Lord Salin obtained bonds from the said Alexander, upon which he adjudged from him the heritage, as charged to enter heir to James his brother; but at the same time granted a back-bond, wherein he obliged himself, so soon as he should attain possession, to dispoise the same in favours of Alexander Short in liferent, and to the heirs of his body in fee; which back-bond was registered. Afterwards, it happened that Alexander Short had children of his own body, who in their minority intended action against Lord Salin's daughters, for denuding of the subjects dispoised to them by Mary Scot, in terms of the above quality in the disposition: In which

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A disposition was granted on death-bed in prejudice of the granter's apparent heir, but with this condition, that the dispoinee should denude in favour of the apparent heir's children whenever they should exist. The apparent heir granted a trust-bond in order to have the subject adjudged from him as repre-

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senting the defunct, and took a back-bond obliging the trustee to denude of the adjudication in favour of him, the apparent heir in liferent, and his children in fee. In a process at the instance of these children against the death-bed disponent, to denude in their favour, in terms of the above condition; the trustees objected, that the disposition was on death-bed, and so null; but this objection was repelled, it being pleaded for the children, that the objector had no other interest than as trustee foresaid, which interest was verified by the back-bond granted by him to their father now deceased. Found that the children pleading thus on their predecessor's evident, not as giving them a right, but to shew that the trustee had no right to compete, did not infer the passive title of behaviour, nor did so much as subject them in *valorem*.

process, compearance was made for Lord Salin, who did *allege*, That he had an interest to hinder his daughters to denude, because he, as creditor to Alexander Short, had adjudged from him, as charged to enter heir to James Short, the said James's rights, whereby he was entitled to reduce the disposition to Mary Scot, as done on death-bed, in prejudice of Alexander Short, James's apparent heir; and that therefore he would not suffer that right to be conveyed, but insisted to have it reduced, and declared null. It was *answered* for the pursuers, That Lord Salin could not found upon his adjudication, or any debt in his person, to prejudge Alexander Short's children, because his rights were only in trust; and that he was obliged by his back-bond, to convey the subject in dispute in favours of Alexander Short in liferent, and his children in fee. Upon which the Lord Salin's daughters were decerned to denude.

It was upon this answer made for Alexander Short's children, that William Wilson, a creditor of Alexander Short, endeavoured, in a pursuit against these children, to fix them in a passive representation to their father; and he *insisted*, That they ought to be liable for their father's debts, because they made use of a right not only belonging to their father, but to which they could not have right but as heirs to him; and that in this the passive title of behaviour was plainly founded, 'Using a right competent to the predecessor, and thereby *gerentes se pro hæredibus*.' For they must only be understood as substitute in the right, notwithstanding the bond is taken to the father in liferent, and the heirs to be procreate in fee, since at that time they were not in existence; for in all such cases, the fee has still been determined to belong to the father. *2dly*, That it had in it *præceptio hæreditatis*, and must be understood as it had been a conveyance by the father to his children *post contractum debitum*; for the case is all one, as that in place of the father's disposing to Lord Salin, and taking a back-bond from him, to denude in favours of himself in liferent, and the heirs of his body in fee, he had directly made a disposition of these subjects to the heirs of his body; seeing what one does by a trustee, is understood as done by himself. It was owned, That the children's declarator and possession did not proceed directly upon the back-bond; but as to this it was *observed*, Though their declarator and possession was founded upon Mary Scot's right, it was alone supported by Lord Salin's back-bond, without which their right was ineffectual in law; and therefore the legal effects ought not to be attributed to the defective right, but to that which gave it force. In all the above mentioned debate, it was never pleaded that Mary Scot's right was good *per se*, it being without controversy liable to the objection of death-bed; but only that the objection was not good at Lord Salin's instance, in regard of his back-bond to their father. Now, if it was impossible to obtain this decret, or support Mary Scot's right, but by the back-bond, it must be held in the construction of law the same, as if the decret had been founded directly thereupon; for it is not only libelling and pursuing upon a predecessor's right, that infers behaviour;

but using or taking the benefit of it, by exception, reply, or any other way. In this argument, it was *contended* to be all one, whether the matter be taken in the view of behaviour or *præceptio*; for the case is applicable to both; it being not only *præceptio* where one possesses *titulo lucrativo post contractum debitum*, but also possessing by any other title, if he make use of the *titulus lucrativus* to defend his possession, and exclude third parties.

It was *answered* for the defenders, *first*, As to the passive title of behaviour, There is no ground in the reason of the law, or in practice, that the founding any allegiance in law upon a writ, supposing it really had been the defunct's, should infer a behaviour. This is truly a penal passive title, introduced to deter apparent heirs from irregular intromission in prejudice of creditors, (See Lord Stair and Mackenzie upon this head.) Whence it follows, where there is no intromission, no disposal of any part of the defunct's estate, nor any deed whereby creditors can be prejudged; this passive title is not competent. And here the pursuer does not found upon any intromission had by the defenders; for they could not be said to have intromitted even with the paper they founded on, because it was a registered deed, and they made use of the extract. In this matter there is a great difference betwixt our law and that of the Romans; among the Romans, they having no services as we have, and no other form of entry, except actual immixtion, or verbal claiming the heritage; so soon as an heir declared his mind to accept of the heritage, he became heir both *active* and *passive*; but with us no declaration, however express, will make an heir either *active* or *passive*. An heir, in our law, must actually enter by a service, or he must intromit; by the one, he becomes heir to all intents and purposes; by the other, for a punishment upon him, he is made liable to all the creditors, who have an interest that their debtor's goods be not abstracted. There is a remarkable decision to this purpose, as it is observed by Dirleton, 20th January 1675, *Carfrae contra Telfer*, No 60. p. 9711, where the Lords found, "That the proponing a defence of payment, or such like, was not such a deed as could infer the passive title of behaving, unless it were administered with intromission or otherwise." For the same reasons it has been found, that the taking out a brieve did not infer a behaviour, 28th June 1670, *Eleis contra Carse*, No 27. p. 9668; where it was also found, that the apparent heir's signing a revocation of deeds done by his predecessor, while minor, did not infer behaviour; though that was as express a declaration of the intention to be heir, as could be; but still there was no intromission, and therefore no behaviour in the sense of our law. *2do*, An apparent heir can never be liable in a behaviour, where the thing intromitted with, or acclaimed, was not *in hereditate* of the defunct, and could not be carried by a service to him; and, in this case it is obvious, that by Salin's back-bond, Alexander Short was only liferenter, and the fee stood provided to the defenders themselves; so that their using that writ, or founding upon it, was not using a writ that belonged to the defunct, but a writ that belonged to themselves; and could never be carried.

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by a service to him. It is true, the pursuer does pretend, That this writ being procured by Alexander Short the father, and his children being but *nascituri*, he must be understood fiar, and the children only substitutes, because a fee cannot be *in pendent*. But to this it is *answered*, That a fee cannot be *in pendent*, is a mere imagination in every case ; but allowing the maxim, no argument can be drawn from it ; for here the fee of the adjudication was not *in pendent*, but remained with Lord Salin, and he only obliged to denude in favours of Alexander Short's heirs, upon their existence. There is a great difference betwixt a disposition and infestment, which denudes the granter, and an obligation to grant a disposition, which does not denude ; in the case of an obligation, there is no pretence for applying this maxim, because the granter is not denuded ; the fee of the subject remaining with him, until the existence of the person who is entitled to demand of him to denude of the fee. *3tio*, Supposing Alexander Short fiar by the conception of the bond, the defenders founding thereupon in the manner they did, could infer no behaviour ; for they did not claim that back-bond to belong to them, nor any benefit thereby, so as to desire Salin to denude of the subjects and diligences in their favours ; but made use of it only as a mean of proof that these diligences were in Salin's person only in trust, and therefore *jus tertii* for him to quarrel their rights ; they only proponed a negative exception, " That Saline could not make use of these rights," not because they were theirs, but because they were not Salin's. There is no manner of inconsistency for the defenders to have said that these titles of Salin's were *in hereditate jacente* of their father ; and therefore suppose they would not use them themselves, they would not suffer Salin to use them in their prejudice ; just as an apparent heir, in case another person really not heir should offer to serve to his predecessor, might compear and object against that service, and say, " That the purchaser of the brieves is not heir, but that he himself is nearest heir." This an apparent heir might do, without the least hazard of behaviour ; it would still be entire for him to accept of the succession, or not, as he thought fit.

To the *second* allegiance, That the defenders are liable *praeceptione hereditatis* ; it was *answered*, Since they did not claim the benefit of the back-bond, so as to make Salin denude in their favours, it can never be said, there was any right derived to them from their father, or that they possessed by virtue of a right from him ; the back-bond, indeed, had that effect, that it debarred Salin from questioning Mary Scot's right, which is their title of possession ; but it will never follow, because that back-bond was granted to their father, therefore they possess by a right from him. Let the case be stated in the worst view, That the defenders had got a discharge of the action of reduction *ex capite lecti* from their father, that might be pleaded sufficient to make their father *passive* liable as representing James Short, but could never make the defenders liable *passive* as representing their father ; far less could the obtaining such a discharge from Salin an adjudger, make them liable ; which is yet clear.

er, if it be considered, that Alexander Short his not quarrelling this right of Mary Scot's, or even his taking Salin expressly bound not to quarrel it, suppose he had done so, is not like a positive ratification granted in the defenders favours; for it was still competent to this pursuer, or any other creditor of Alexander Short's, to have adjudged from him as charged to enter heir to James, and then to have reduced the defenders right; and if this was neglected, *sibi imputent*. This is plain, the defenders have no right from their father; only he omitted to quarrel their right, and at most took one creditor, Salin, bound by a deed not to quarrel it; but this was no restraint upon other creditors, and cannot by other creditors be said to be a deed whereby the defenders' rights were strengthened or supported, since against them it had no effect.

It was *urged*, in the *next* place, for Wilson the pursuer, That in any view, the defenders must be found liable *in valorem*; for since they have got a benefit by a deed of their father's, equity dictates, that they ought to account to his onerous creditors for the value of that benefit.

The defenders acknowledged, That the Lords have sometimes found an apparent heir liable *in valorem*, where he neither had behaved, nor was liable *præceptione*; as for instance, where the father had acquired lands in name of his son, or in a trustee's name for his son's behoof. But the reason was, not only because the son had got a benefit from a right purchased by the father, but because the creditors pursuers sustained a prejudice, by the father's applying so much of his means towards the purchasing that estate in the son's name, or for his behoof. And, *2do*, It is to be observed, wherever such a case happened, the creditor was entitled to reduce the apparent heir's right; and that being reduced, to affect the subject by a diligence; in which circumstances, to save the trouble and circuit of diligences, the Lords have frequently made the heir directly accountable *in valorem*. All which serves to prove, that the claim here is groundless; for, *1mo*, The defenders do refuse, that any subject that ever was purchased by their father's money, was, or is lodged in their person. It does not even appear, that the back-bond was purchased by his means or money. *2do*, They do refuse, that any part of the subject of Wilson's payment, or which he can now affect by any form of diligence, is in their person. He had it, indeed, once in his power, by charging Alexander Short to enter heir, to state himself in his place by adjudication, and to insist against Mary Scot in a reduction *ex capite lecti*; this he has neglected, and now he has it not in his power; but his negligence must land upon himself, and the defenders must be assoilzied, who possess no subject that the pursuer has any manner of claim to.

“ THE LORDS assoilzied the defenders.”

Act. Sir Wal. Pringle.

Alt. Ro. Dundas.

Fol. Dic. v. 2. p. 32. Rem. Dec. v. 1. No 7, p. 12.

No 64.

The universal passive title of behaviour restricted to actual intromission.

1739. February 20. ROSE against EARL MORAY.

IN the contract of marriage between James Lord Down, eldest son to Alexander Earl of Moray, and Lady Catharine Talmash, the Earl disposed his lordships of Down and Pettie 'to the said James Lord Down, and the heirs-male of the marriage, which failing, to the Lord Down's heir-male of any other marriage, which failing, to return to said Earl himself, his heirs-male and assignees whatsoever.'

Upon James Lord Down's death in 1685, without heirs-male of his body, the Earl his father took up the estates of Down and Pettie upon the clause of return in the Lord Down's infeftment, without serving heir to him; and upon Earl Alexander's death, Earl Charles his son served heir to him therein; and the present Earl Francis served heir therein to his brother Earl Charles.

Colonel Rose having right to a debt due by the Lord Down, pursues Francis the present Earl of Moray upon the passive title of behaviour as heir to Lord Down, to whom he is apparent heir by the infeftment 1678, and whose estate he possesses; at least, *2do*, on this ground, That Earl Alexander having possessed the estate of Lord Down several years, without making up any title, whereby he became liable for Lord Down's debts, though the passive title, so far as penal, did expire, and did not bind his heirs, yet to the extent of the real value of Earl Alexander's intromission, Earl Charles his second son and heir served to him was liable; for so far the passive title was not penal. And on the same principles, Earl Charles having also intromitted, the defender, as heir served to him, is liable to the extent of the intromissions of both Earl Alexander and Earl Charles; and *3tio*, upon the same principles for his own intromissions.

THE LORDS gave no judgment upon the *first* point, How far the defender was liable upon the universal passive title of behaviour; but it appeared to be there opinion, that he was not universally liable, as behaviour is *animi*, and that the defender's possession upon a service, however erroneous, discovered no intention of representing Lord Down. But then it was thought to admit of no doubt, that the defender was liable to the extent of his own and his predecessors intromissions with the *hereditas jacens* of Lord Down.

Accordingly 'so the LORDS found;' which was all that the pursuer had occasion for, as a small part of one year's intromissions was sufficient to answer his debt.

Whereas some of the LORDS had pointed at the defender's being liable upon the act 1695, the Court was of opinion that the present case did not fall under it, as there was neither here any right purchased, nor any passing by of an immediate predecessor and serving to a remoter; nor was there a possessing without a title, though the possession was upon an erroneous one; and that therefore it was a case not provided for by the act.

But there was another point about which the reporter doubted, how far, although in the case of the moveable passive titles it is usual to allow a pursuer, insisting on the universal passive title, to restrict his libel to actual intromission, the same was to be allowed in the case of an heritable passive title, of which he knew no instance; though in the vote he concurred with his brethren, who unanimously found as above.

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It is *indubitati juris*, that with respect to the method of the disponent's making up his title in the event of a clause of return's taking effect, there is no difference between such clause of return and a common substitution; for the fee being once vested in the donee, the estate, upon failure of him and the heirs substitute to him, cannot in either case be otherways taken up than by infestment as heir to him; and which in this case was supposed to be no question, which is rather stronger than a decision.

It is no less true, that where an estate is disposed to a presumptive heir and the heirs of his body, with a clause of return to the granter on failure of such heirs, such clause of return is held as no other than a simple substitution, and does not restrain the donee even from gratuitously alienating the estate directly, or indirectly, by contracting debt; though where such clauses are in a conveyance to a second son and the heirs of his body, to return to the family on the failure of such heirs, the second son is understood to be limited from doing gratuitous deeds in prejudice of the clause of return; but even in that case, where there are no prohibitory and irritant clauses superadded, such clause of return has no effect against an onerous creditor.

Fol. Dic. v. 4. p. 41. Kilkerran, (PASSIVE TITLE.) No 3. p. 367.

1742. *January* —. Renny against BALLENY.

IN a process upon the passive titles, before the inferior Court, for payment of a bill accepted by initial letters, the defender having denied the passive titles, and also proponed an exception to the validity of the bill as only accepted by initial letters; the Judge sustained process, the pursuer proving that the defunct was in use to subscribe by initials; and upon advising the proof, found, that the defunct was in use to subscribe by initials, and sustained the bill, and found the defender's proponing a peremptory defence was an acknowledgment of the passive titles, and decerned.

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How far the maxim extends, that proponing a peremptory defence infers a passive title.

When in a suspension of this decree, the case came before the LORDS by petition against the interlocutor of an Ordinary, finding the letters orderly proceeded; the LORDS demurred pretty much.

It was on the one hand observed, that it had been of old established, that proponing of payment was an acknowledgment of the passive titles; that it had been long a disputed point, whether or not that was to be extended to the proponing of prescription, and that at last it had prevailed that it should; but

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as to the question now before the Court, whether it should be extended to the objecting of a nullity, it was new and the rule had never yet been so far extended.

It was on the other hand said, That where no proof was necessary, the defender might safely object a nullity appearing *ex facie* of the deed; but that no man could, without acknowledging the passive titles, put the other party to a proof.

All however agreed to allow the petition to be seen; and upon advising the the petition with the answers, wherein there was nothing new said, the LORDS, without further argument, 'found that the proponing the said defence was not an acknowledgment of the passive titles, and remitted to the Ordinary to proceed accordingly.'

Fol. Dic. v. 4. p. 43. Kilkerran, (PASSIVE TITLE.) No 4. p. 368.

No 66.

1743. July 2.

HUTCHISON against MENZIES.

HUTCHISON obtained decree in absence, against Menzies of Troloss, to whose oath the passive titles having been referred, he did not depone. Menzies raised a reduction of the decree, wherein a proof of the passive titles was allowed, and accordingly a disposition was recovered, by which Menzies, under the character of apparent heir, disposed the estate belonging to his father, to trustees, for behoof of his creditors. He thereby also bound himself to make up his titles, and gave the trustees full power to infest him. He delivered over to them the writs in his possession, and empowered them to pursue for the rest. And lastly, he took the trustees bound for the surplus after payment of the creditors. In the end of the disposition he declared, that this deed was by no means to subject him personally, or his other estate, to pay of his father's creditors. THE LORDS found the disposition a passive title.—See APPENDIX.

Fol. Dic. v. 4. p. 42.

No 67.

Whether, although a decree had been pronounced declaratorie, finding a person liable on the passive titles, he could be distressed on a bond?

1745. January 29.

ELIZABETH RAMSAY against The CREDITORS of CLAPPERTON of Wylliecleugh.

BOTH parties in this question founded on apprisings affecting the lands of Easter Wylliecleugh, and mutually objected to each others titles, Elizabeth Ramsay the heiress of the family, on an apprising deduced by Hope-pringle of Torsonce, 4th June 1645, which was now in her person, and the Creditors of the deceast Richard Clapperton on one deduced by Alexander Kennier, which came into the person of a predecessor of their debtor.

Objected against Kennier's apprising; that it is destitute of foundation, nothing being produced to support it, but a decret in absence, without grounds; and there is a certification standing against the bond, on which it is pretended to have proceeded. The decret cannot support it, wanting support itself, since it was *ultra vires* in the judge to pronounce decret where there was no debt; and want of power is an intrinsick nullity that may be proponed at any time; and thus the apprising must fall without aid from the length of time, since so long as it stands on the footing of a naked decret, it can never be supported without its grounds.

Answered, That the foundation of the apprising was the decret of constitution. An heir pursued on the passive titles (which was the case here) was laible to be distress only in virtue of the decret pronounced against him, and his predecessor's bond served only for an instruction of debt: If a decret were pronounced *declaratorie*, finding a man liable on the passive titles, he could not be distressed on a bond; and it was doubted, if this bond had been lost in a few years, whether the decret itself, mentioning the production, would not have been a ground of debt, much more was it now sufficient, after a possession on the apprising of eighty years (which was alleged) and though the parties had been sixty years in process, this was never mentioned till two years ago; the apprising was supported by the negative prescription, which excluded the reduction thereof, notwithstanding that on account of the continued processes, there was no positive prescription; for whatever might be said where a right was kept latent, yet where possession had been had thereon for so long, and the opposing party had not made the objection, the Creditors must be very well founded in their plea of prescription.

Objected, 2dly, The apprising is null, because John Ramsay against whom it is led, is charged to enter heir in special to Ramsay his brother; and this charge is null, both from the uncertainty of the predecessor who is not named, and because the defender's brother had only a personal right to the lands; and therefore he ought to have been served with what is called a general special charge.

Answered, A pursuer's ignorance of the christian name of his debtor's predecessor, can never hurt him; and a charge to enter heir in lands, comprehends a charge to enter to whatever right the defunct had.

Objected, 3dly, The debt on which this apprising proceeds, belonged to one Nicolson, the letters are raised in his name, and upon the narrative of an assignation, decret of apprising is pronounced in favours of Kennier, which exceeds the powers of a delegated Judge, such as a messenger is, and at any rate the apprising is null, as the assignation is not produced.

Answered, It is too late to object the want of the assignation, as there can be no doubt it once existed; and as a Sheriff can certainly decern in the name of an assignee, when process is raised in the name of the cedent, so may a messenger, who is Sheriff in that part.

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Objected to Torsonce's apprising, That part of the sum on which it proceeded, was a bond due to the Earl of Roxburgh, and assigned by his factor, and though factors might uplift, they could not assign.

Answered, This bond was payable to the Earl, his factors and chamberlains, and as factors could discharge, so it was thought they might assign, on receiving the full value, and the presumption was, this factor had accounted fairly with his constituent; besides, it was *jus tertii* to the Creditors to start this objection, which was only competent to the family of Roxburgh.

It was *objected*, That this apprising was satisfied within the legal, and it was endeavoured to be inferred from presumptive arguments, that possession had been obtained thereon, at, or shortly after it was led, and had continued so long as to operate an extinction by payment; but as the argument run into a great length, and was scarcely capable of being made intelligible in an abridgement; and besides there was no point of law to be determined, which it might be useful to observe as a decision, it was thought proper to omit it.

THE LORDS 18th December 1744, repelled the objections *binc inde*.

Upon mutual reclaiming bills and answers, the LORDS adhered.

Reporter, *Lord Strichen*.

For the Creditors of Clapperton, *Lockhart & Hay*.

For Elizabeth Ramsay, *H. Home*.

Clerk, *Forbes*.

D. Falconer, v. 1. p. 62.

No 68.

1747. November 25. CATHCART against HENDERSON.

Whether the passive title can be inferred from the intromissions of a factor *loco tutoris*.

WILLIAM HENDERSON being appointed factor *loco tutoris* to the infant children of Quintin Dick, and having intromitted with the defunct's effects, which were all moveable, Elias Cathcart, a creditor of the defunct's, brought a process against the pupils and their tutor, on the passive titles, before the Sheriff of Ayr, and recovered decree.

At discussing the suspension of the decree, "the letters were suspended, because no passive title was proved."

The view the LORDS took it in was, that infants could not incur a passive title by intromission, nor could the intromission of a factor appointed by the LORDS involve them in a passive title; and that therefore the proper method for the creditor was to confirm executor-creditor.

But in this the Court was not unanimous; for several of the LORDS were of opinion, That where a factor, appointed to infants *loco tutoris* intromits, action is competent on the passive titles against the infants and against the factor *tutorio nomine*, in the same way as such action would be competent in case of tutors intromitting.

Fol. Dic. v. 4. p. 41. Kilkerran, (PASSIVE TITLE.) No 8. p. 371.

* * * D. Falconer reports this case.

1747. November 24 — WILLIAM HENDERSON in Gueltryhill was appointed factor, *loco tutoris*, to the children of Quintin Dick, over the effects of their father and grandfather John, who had survived his son.

Elias Cathcart, merchant in Ayr, and Mary Machutcheon, his spouse, being creditors to John Dick, pursued the children and their factor, as vitious intrmitters with his effects.

Pleaded in defence, That the action on the passive titles was incompetent against the Lord's factor, and the children were incapable of intromission.

The LORD ORDINARY, 2d July 1746, "In respect the pursuer's procurator did not offer to prove the passive titles against the children, assoilzied all the defenders from that instance."

Pleaded in a reclaiming bill, A factor, *loco tutoris*, must be liable in the same manner as a tutor; if he has intromitted regularly, he and his pupils are liable *in valorem*, if irregularly, he is liable as vicious intromitter, and they to the value of his intromission; the creditor here has no other method of getting payment of his debt; for he cannot confirm, as executor-creditor, these subjects, which, by the Lords authority, the factor is in possession of; and if he did, he would not get them into his possession,

Answered, A factor is by the act of sederunt directed only to confirm, if necessary; and therefore, if he intromit without confirmation, he cannot be subject to a passive title; he is liable as tutor, but a tutor is not bound to pay till a debt is constituted against his pupils; so the pursuers may constitute their debt by a decret of cognition, and then apply for a warrant upon the factor.

Observed on the Bench, That the factor's intromission did not subject him to a passive title: That the defunct's effects could not be affected by the creditor without a title, and therefore he ought to confirm, in which method other creditors would have an opportunity of applying to be conjoined, and then pursue the factor.

THE LORDS did not sustain action.

Act. A. Macdonal.

Alt. H. Home.

D. Falconer, v. 1. No 210. p. 290.

* * * Lord Kames's report of this case is No 20. p. 2142, *voce* CREDITORS of a DEFUNCT.

1752. February 26. LADY JANE SCOTT against DUKE of BUCCLEUGH.

ANNE Dutchess of Buccleugh had, in Scotland, besides the family-estate which was entailed, a considerable estate of her own purchasing. In the year

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Where a person grants a bond binding himself and his heirs in

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a certain subject, if he make up no titles to that subject, nor possess it for three years, and his heir serve as to that subject to a remote predecessor, but represent the grantor in other subjects, the obligation will still be valid against the heir to affect that subject.

1731, she came to a resolution to provide the children of the Duke of Buccleugh, her grandson, in number three, Francis, afterwards Earl of Dalkeith, Lord Charles, and Lady Jane. She settled the separate estate upon the Earl of Dalkeith, and the heirs of his body, &c. She granted a bond of L. 20,000 Sterling to Lord Charles, and the heirs of his body; whom failing, to the Earl of Dalkeith, and the heirs of his body; whom failing, to Lady Jane, and the heirs of her body. For security of the sum in this bond, Lord Charles was infeft in the separate estate, and, at the same time, the Earl of Dalkeith was infeft in the separate estate as proprietor.

Lord Charles died in July 1747, whereby the succession of the same bond opened in favours of his elder brother, the Earl of Dalkeith; and, at the same period, there was a family transaction betwixt the Duke and the Earl, by which, provision was made for payment of the family-debts, and the entailed estate was made over to the Earl, upon condition of granting a bond of provision to his sister Lady Jane. And as it was not safe to contract debt upon the family estate, which was entailed, the bond was executed in the following terms: The Earl "bound himself, and the heirs succeeding to him in the heritable bond granted by Anne Dutchess of Buccleugh to Lord Charles, to pay to his sister Lady Jane the sum of L. 15,000 Sterling, to the end that she might, upon the said obligation, charge him to enter heir in special to his brother Lord Charles, and thereupon obtain an adjudication of the heritable bond, redeemable upon payment of the said L. 15,000, with interest. And it is specially provided and declared, that no diligence should be competent upon this obligation against the person or estate, real or personal, of the grantor, except the foresaid heritable bond granted to Lord Charles."

In pursuance of this obligation, the Earl was charged to enter heir in special to his brother Lord Charles; an adjudication was brought, and nothing remained to complete the pursuer Lady Jane's right, but decerning in the adjudication, when, to the great misfortune of the family, the Earl was carried off by a sudden illness in April 1750, leaving an infant son his heir; and as the tutors did not think themselves impowered to grant any deed, a process was brought at Lady Jane's instance, concluding against the infant, that he ought to be liable upon the passive titles for payment of her provision of L. 15,000.

Though her claim was equitable, and was entitled to the utmost favour, the difficulty was great to find a medium upon which the infant could be made liable. He was not liable as representing the Earl his father in the family-estate, or in the moveables; because, by the tenor of the Earl's obligation, it was confined to the single purpose and effect of attaching Lord Charles's personal bond; and all other subjects belonging to the Earl are freed from this claim. Neither could he be liable as heir in the said heritable bond, because his title must be made up as heir to his uncle Lord Charles, who died last vest and seized in the same. Nor could the act 1695 aid the pursuer, because the

Earl did not survive his brother three year; and consequently, it could not be qualified that he was three years in possession of the said bond.

It occurred to me as the only *medium concludendi* against the defender, that as it was the Earl's intention declared in a formal writing, to give his sister a right to the heritable bond, to the limited extent of L. 15,000 Sterling, the Earl's heir who has succeeded to the heritable bond, though not in right of his father, ought to be decerned in equity to pay Lady Jane's provision, as far as he is *lucratus* by his father's succession; that is, to the extent of the personal estate, and all that is derived to him from his father, except what is entailed. And this I observed was the same medium that subjects a man who is *lucratus* by his marriage to pay his wife's debts after her death.

Elchies took a shorter road; he implied an obligation upon the Earl of Dalkeith to make up titles to the heritable bond, and to convey to Lady Jane for security of the L. 15,000; and he thought the defender, his heir, was liable to implement this obligation. And accordingly, upon this medium, the LORDS pronounced the following interlocutor:

"In respect that the succession to the heritable bond has, by the death of the Earl of Dalkeith, devolved to the defender; and that the defender is heir served and, retoured to the Earl his father, and has succeeded to him in all his other estates; therefore find the defender liable to perform and make good the obligation for L. 15,000 Sterling, granted by the Earl of Dalkeith to the pursuer, so as effectually to give her security in the heritable bond."

I am not satisfied with the *ratio decidendi*. In the deed granted by the Earl to his sister, I can find no obligation upon him, expressed or implied, to make up titles; but the contrary, for the express agreement is, That the titles should be made up in Lady Jane's person, by a charge to enter heir and adjudication.

Fol. Dic. v. 4. p. 40. Sel. Dec. No 4. p. 5.

*** This case is reported in the Faculty Collection.

ANNE Dutchess of Buccleugh was possessed of the family-estate under a strict entail; but having purchased the lands of East-Park, and several other lands, she, on the 13th April 1731, executed a settlement thereof in favours of her great-grandson Francis, afterwards Earl of Dalkeith, eldest son of Francis Duke of Buccleugh, and the heirs of his body; whom failing, to Lord Charles Scott, second son to the Duke, and the heirs of his body; whom failing, to the Duke of Buccleugh, and the other heirs therein mentioned, subject to the conditions, and clauses irritant and resolute, usual in strict entails. Upon this settlement the Earl was infeft.

Of the same date with the settlement, the Dutchess granted a bond for L. 20,000 Sterling, payable by her Grace, her heirs and successors whatsoever,

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to the said Lord Charles, and the heirs of his body; whom failing, to the said Francis Earl of Dalkeith, and the heirs of his body; whom failing, to Lady Jane Scott, eldest daughter to the Duke of Buccleugh, and the heirs of her body; whom failing, to return to her Grace, and her heirs. The bond contains an obligation to give infeftments in the lands of East-Park, and others, purchased by the Dutchess, for security of the payment of the said provision; and, in consequence thereof, Lord Charles was infeft.

Lord Charles Scott died in the month of July 1747, and thereby the succession of the foresaid bond opened to the Earl of Dalkeith; and, on the 15th of August 1748, the Earl granted a bond of provision to his sister Lady Jane Scott, narrating the foresaid L. 20,000 bond, and that the succession thereof had fallen to him, and that the said Lady Jane was unprovided by her father, and therefore "obliging himself, his heirs and successors, in the foresaid heritable bond of provision, to content and pay to the said Lady Jane, her heirs, &c. the sum of L. 15,000" at the terms mentioned in the bond, with annualrent, &c. "to the end she might, upon the said obligation, charge him to enter heir in special to his brother Lord Charles, and might thereupon obtain an adjudication of the foresaid bond, redeemable upon payment of L. 15,000 and the interest thereof." And the bond contains a proviso, "That no diligence should be competent thereupon against the person, or other estate of the Earl, except the foresaid provision granted to the said Lord Charles Scott, and the foresaid heritable bond granted to him, and infeftment following thereupon."

This provision being made for Lady Jane, Francis Duke of Buccleugh, on the 4th of March 1749, disposed the fee of the whole family-estate in Scotland to the Earl of Dalkeith (except in so far as it had been formerly disposed to the said Earl in his contract of marriage;) and, of the same date, conveyed to the Earl his household-furniture in Scotland, and also settled upon him the whole personal estate in Scotland that should belong to the Duke at his death.

Lady Jane Scott was proceeding to affect the foresaid L. 20,000 bond, by legal diligence upon the bond or obligation granted to her by the Earl of Dalkeith. But the Earl dying in April 1750, before the decret of adjudication was pronounced, her diligence proved ineffectual.

The Earl was succeeded by his infant son, who was served heir of provision to him in the whole family-estate, and who also attained possession of the household furniture, which had been disposed to the Earl as above-mentioned.

After all these transactions, Francis Duke of Buccleugh also died.

Lady Jane Scott brought a process against the said infant (now Duke of Buccleugh) and his tutors, upon the bond granted to her by the Earl, in order to obtain a decret of constitution, that she might thereupon adjudge the foresaid heritable bond of L. 20,000.

Pleaded for the Duke and his tutors, That although the tutors are very sensible of the melancholy situation of the pursuer, in case it shall be found, that

the bond of provision, pursued on, hath become ineffectual by the accident of the Earl of Dalkeith's death; yet they not only have no power to relieve her, but are obliged to state the following defences, competent to their pupil, against this action of constitution, viz.

1st, By the bond pursued on, the Earl bound only his heirs succeeding to him in his brother Lord Charles's bond of provision; and, by the Earl's death before he made up titles to this bond, he never can have heirs therein; for if the the defender makes up a title to this bond, he can only do it by a service as heir to the said Lord Charles Scott, and will not thereby be liable to fulfil the foresaid bond or obligation granted by his father to the pursuer.

2dly, The pursuer's bond of provision contains an express condition, that it should not affect the Earl's person, or other estate, except Lord Charles's bond of provision alone; and therefore, though the defender has succeeded to his father in the family-estate and moveables, yet this cannot be available to the pursuer, because of the said limitation or condition in the bond.

Answered for the pursuer, That the Earl's obliging his heirs succeeding to the L. 20,000 bond, might have given relief to the Earl's other heirs, had they been different; yet still, as he obliges himself, he thereby bound his whole representatives, of whatever denomination; and as the defender is heir served to the Earl, he is, upon that passive title, bound to implement the Earl's bond. As to the restrictive clause in the bond pursued on, the pursuer only insists for a decret of constitution *ad hunc effectum*, that she may, on such decret, charge the defender to enter heir in special to Lord Charles Scott, in the foresaid bond of provision, to the end she may thereupon adjudge the foresaid bond from the defender.

Observed on the Bench, That when one binds his heirs in a certain subject, he binds those who might be heirs to him in that subject, though they make up their titles to the subject, as heirs to a remoter predecessor, and passing him by, if they be also his heirs general.

It was also observed, That the binding of heirs in the obligation to the pursuer, was intended for the event of the adjudications not being led in the Earl's lifetime; for, had it then been led, there would have been no occasion for binding his heirs; but the binding these implied, that the Earl ought to make up titles to the bond, that he might have heirs therein, and his heirs are bound to supply what he did not do.

" THE LORDS found, That in respect the succession to the heritable bond of L. 20,000, granted by Anne Dutchess of Buccleugh to Lord Charles Scott, and the heirs of his body; whom failing, to the deceased Francis Earl of Dalkeith, and the heirs of his body; had now, by the death of the said Earl, devolved to the defender his eldest son and heir; and that the defender was heir served and retoured to the said Earl, the granter of the bond now sued for, and had succeeded to him in all his other estates; therefore he was liable to perform and make good the said bond for L. 15,000 Sterling, and interest thereof, grant-

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ed by the said Earl to the pursuer, so as effectually to give her security, in the said heritable bond of L. 20,000 Sterling, and infestment following upon, for security and payment to her of the said L. 15,000 Sterling, and interest thereof, and penalty, if incurred; but not to affect the defender's person, nor his other estate.

Reporter, *Lord Minto*.Act. *A. Lockhart & R. Dundas*.
Clerk, *Forbes*.Alt. *Ja. Ferguson & Jo. Grant**Fac. Col. No 7. p. 10.*

No 70.

1757. December 1. GORDON against MAITLAND.

FOUND, That a service as heir male upon a deed of entail, but without reciting the prohibitory clauses, does not infer an universal passive title.

*Fac. Col.** * See this case, *voce* TAILZIE.

No 71.

1760. November 19. HALL against BUCHANAN.

A creditor pursuing a decree of constitution in common form against the son of his debtor, who, in obedience to the order of the Court, had made up titles to his father's estate, and disposed the same to assignees, under a commission of bankruptcy; it was urged, That he could not renounce to be heir, and ought to be subjected *passive* to the debt pursued for. THE LORDS found no passive title was incurred. See APPENDIX.

Fol. Dic. v. 4. p. 42.

1782. November 19. SAMUEL BROWN against PETER BLACKBURN.

No 72.

How far a residuary legatee, accepting a sum of money for a conveyance of his right, is liable to that extent for the testator's moveable debts.

By the death of Dr Brown of Jamaica, his personal estate in that island, after payment of his debts and certain legacies, devolved to Mr Blackburn, in the character of residuary legatee, his real estate there, to Patrick Brown, as his heir at law; and a debt due to him, which was secured by infestment in Scotland, to Samuel Brown, as his heir of conquest.

A transaction took place between Mr Blackburn, the residuary legatee, and Patrick Brown, the heir in Jamaica; by which, for the sum of L. 1000 Sterling, the former sold to the latter his interest in the personal estate.

It however soon appeared, that the subjects falling under this transaction were inadequate to the payment of the Doctor's debts; and a personal creditor

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of his having attached in Scotland Samuel Brown's share of the succession, the latter, for his relief, pursued Mr Blackburn, as having intromitted with the effects primarily liable for debts of that sort. In support of this action, the pursuer

Pleaded; By the acceptance of a considerable sum as a *surrogatum* in place of the whole free executry, the defender must be understood to have intromitted to that extent with the moveable estate of the defunct; otherwise, it would be in the power of the executors, or residuary legatees, by agreements of this kind, in defraud of creditors, to secure the whole funds to themselves.

Answered; Had the residuary legatee, by the interposition of a third party, intromitted with the moveable funds of the deceased, his situation must in all respects have been the same as if he had taken effects to the same extent directly under the will. But here there were no effects to be the subject of intromission. The bargain, therefore, concerning the eventual profits arising from the bequest in favour of the defender, not having in the least diminished those funds out of which the pursuer could hope for relief, it affords no foundation for the present claim. July 5. 1666, Scots against Affleck, No 50. p. 9694.

THE LORDS sustained the defences. See No 21. p. 5228.

Lord Reporter, *Hales*.
Clerk, *Heme*.

Act. *Rae*. Alt. *Armstrong, Ilay Campbell, Crispie*.

G.

Fol. Dic. v. 4. p. 43. Fac. Col. No 66. p. 104.

1783. February 26. JOHN BLOUNT against JOHN NICOLSON.

BLOUNT was creditor to the father of Nicolson, who died the proprietor of a tenement in the town of Dumfries. In this tenement Nicolson was cognosced heir to his father by the Magistrates of the town *more burgi*. He afterwards disposed the subjects to certain persons, as trustees for his father's creditors; having done so by the direction of a meeting of these creditors.

Blount then instituted an action on the passive titles, against him as having entered heir *more burgi*, and likewise as having granted the disposition above mentioned.

Pleaded for the defender; 1st, By entering *more burgi* heir to his father in a special subject only, he is not universally liable for the debts of the predecessor, but only *in valorem*, in the same manner as if he had been an heir of provision. 2dly, The disposition was *bona fide* granted at the desire, and for the benefit of creditors, and ought not to infer to him the penal consequence of a passive title.

Answered; There is no distinction known in law as to the extent of representation between entering heir *more burgi* and service in the more regular and

No 73.

Passive title, whether inferred, universally, by entering heir *more burgi*, or by *bona fide* disposing the heritage to trustees for the predecessor's creditors.

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formal manner. If an heir wishes not to represent universally, he may resort to the *beneficium inventarii* introduced by the statute of 1695, c. 24. That is the proper and only resource in such a case ; and they who without recurring to it chuse to take upon themselves the general character of heirs, should not pretend to decline an universal representation. With respect to the disposition, as it would be clearly of evil consequence to creditors, if an heir, without subjecting himself to the debts of his predecessor, were at liberty to convey his predecessor's subjects to any person whom he might think proper to nominate in the capacity of trustee ; so that conveyance ought to infer a passive title.

This question having been reported to the Court by the Lord Ordinary, the " LORDS, in respect the only passive title acknowledged by the defender was that of being cognosced heir to his father *more burgi* in a tenement in Dumfries, which he conveyed to trustees for behoof of his father's creditors, sustained the defence."

Lord Reporter, *Braxfield*.
S.

Act. *Maclaurin*. Alt. *Corbet*. Clerk, *Menzies*.
Fol. Dic. v. 4. p. 42. Fac. Col. No 100. p. 159.

1784. July 7.

THE CREDITORS OF PROVOST AYTON *against* MARGARET AYTON.

PROVOST AYTON having been vested in an estate, in trust for Mr Colvill, Margaret Ayton, his daughter, agreed, after his death, to grant a reconveyance.

As Provost Ayton had executed a general disposition in favour of his daughter, she might have fulfilled her agreement, without the intervention of a service, or incurring an unlimited representation ; but the doer of Mr Colvill, at whose expense the business was carried on, being ignorant of that circumstance, exped a general service in her behalf, as heir to her father, after which she redispensed the estate to Mr Colvill.

Some time afterwards she was pursued by the Creditors of Provost Ayton, on the ground of the service just now mentioned.

The Lord Ordinary assolizied, " in respect there was sufficient evidence that the general service was not taken in order to vest any right of succession, but merely for the purpose of renouncing a trust, and that the pursuer declined any proof of actual intromission."

The pursuer reclaimed ; when it was

Observed on the Bench ; To admit the circumstances stated in the Lord Ordinary's interlocutor as a defence, by way of exception, against the known legal consequences of a general service, would be a dangerous innovation

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General service as heir of line, an universal passive title till set aside by reduction.

Here however there is sufficient ground to relieve the defender, by setting aside the service altogether, in a proper action brought for that purpose.

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THE LORDS remitted the cause to the Lord Ordinary, in order that a reduction of the service might be brought by the defender.

Lord Ordinary, *Gardenston.* Act. *Wight.* Alt. *Maconochie.* Clerk, *Robertson.*

G. Fol. Dic. v. 4. p. 44. Fac. Col. No 168. p. 263.

1789. January 27. HUGH GORDON against ALEXANDER CLERK.

No 75.

JOHN CLERK executed several special deeds of settlement, by which he conveyed to James, one of his younger sons, all his moveables, and also his whole heritage, but an heritable bond for L. 60, that being omitted in the enumeration contained in the different dispositions.

On the death of John Clerk his debts far exceeded his executry-funds. Afterwards, when the heritable bond came to be paid, Alexander, the eldest son, joined with James in granting the discharge; the former denominating himself "the heir at law," and the latter "the donee and executor" of John Clerk.

James having become insolvent, Gordon, a creditor of John Clerk's, sued Alexander for payment of the debt, as having in that manner incurred the passive title of *gestio pro hærede*.

The defence stated was, that the debt had been conveyed in a general disposition to James, so that the discharging of it by Alexander was an inept and insignificant proceeding. It turned out, however, that no such general disposition had been made; and the Court finally "repelled the defence."

The defender having appealed to the House of Peers, "the cause was thence remitted to the Court of Session, without prejudice, with liberty to the defender to produce such proofs as he could, that James Clerk, at the date of the discharge, was entitled to the debt of L. 60."

When the cause thus came again into Court,

The defender *pleaded*; James Clerk, who was his father's executor, was also his donee in heritage; while the defender, as heir-at-law, had right to the undisposed of security for L. 60. Now, as the executry-funds fell far short of the personal debts, James was entitled to attach the subject falling to the heir-at-law, in order to extinguish those debts, that the right might be preserved to him, which, as a singular successor, he had obtained by his father's settlements. In the subject of the discharge, therefore, the defender had no real or substantial interest; and it would be hard to construe an act, which could not reasonably be done, with any view to his own profit, into the passive title of *gestio pro hærede*. "Passive titles are not now so strictly attended to as they were formerly." Ersk. b. 3, tit. 8. § 83. Even at a more early period relief was

An heir-at-law, who, as such, had concurred with a gratuitous donee in heritage, in granting a discharge of an heritable debt falling to the heir, but from enjoying which he was precluded, by the donee's claims of relief from the ancestor's debts, found not thereby to incur the passive title of *gestio pro hærede*.

No 75.

given in a case not dissimilar to the present. *Harcarse*, 16th December 1682, Thomson *contra* Anderson, No 80. p. 9736.

Answered; No act of behaviour as heir can be conceived more complete than that in question, done not only in the character but under the appellation of heir-at-law; 1. 20. *D. De acquirend. vel. amittend. hæred.* Stair, B. 3. T. 6.; Bankt. B. 3. T. 6.; Ersk. B. 3. T. 8. § 82. Nor is there any room for the defender's plea of favour, in opposition to a passive title so salutary in guarding against the fraud of heirs. The law should act with a constant and regular operation, giving in all cases a settled effect to settled principles, however individuals may happen to be affected; nor, in truth, is any thing more favourable than a due and steady application of the same law to all cases falling under it. If this be departed from, a *jus vagum et incertum* will be introduced, under which no man can know to what he should trust; and it is better that one man should suffer by his own inattention or fault, than that the law, and through it the security of the whole subjects, should be injured. Accordingly heirs are held to be liable, even where there is not the least suspicion of intromission; Stair, July 1672, Foulis *contra* Forbes, No 59. p. 9711.; July 2. 1743, Hutchison *contra* Menzies, No 66. p. 9722.; HERITABLE AND MOVEABLE, Sect. 28.; Ersk. B. 3. T. 8. § 84.; Bankt. B. 3. T. 5. § 102. Nor is the case quoted from *Harcarse* different; for the defence there was, that the debt had not been discharged. At the same time it is to be observed, that James could have no occasion for a claim of relief against the L. 60 security, because it was only *quoad* the excess of the debts beyond that part of the disponer's estate, that the disposition to James was reducible at the suit of creditors.

The Lord Ordinary again repelled the defence; and the defender reclaimed to the Court, when it was

Observed on the Bench; As the Court, in the case of Maitland of Pitrichie, No 70. p. 9730.; in that of the Creditors of Ayton, No 74. p. 9732.; and in other instances, have given relief against an actual service, when there was no intention to represent; so, *a fortiori*, is that indulgence due here, where the claim is laid on the mere appearance of *gestio pro hærede*.

The COURT altered the Lord Ordinary's interlocutor, and "sustained the defence against the passive title of *gestio pro hærede*."

Lord Ordinary, *Alva.* Act. *M. Ross.* Alt. *Lord Advocat.* Clerk, *Gordon.*
S, Fol. Dic. v. 4. p. 41. Fac. Col. No 56. p. 98.

1791. May 13.

No 76.

Where the
intromissions
of the heir
have been

THE CREDITORS OF BRYCE, WILLIAM, and GEORGE BLAIRS, *against* DAVID BLAIR.

AFTER the death of Bryce Blair, and his two sons William and George, who were proprietors of certain lands in the county of Dumfries, David Blair, their

apparent heir, executed a deed, conveying the whole subjects to trustees, with powers to manage them, and also to sell what part was necessary for discharging the debts.

David Blair afterwards made up inventories with a view of entering heir *cum beneficio*, in virtue of the act 1695, chap. 24. His trustees also let a part of the lands, and for several years uplifted the rents; and they likewise sold some small parcels of land; but the sales were afterwards given up, the trustees not being in a situation to grant the necessary conveyances.

At last, after an interval of ten years, a process of ranking and sale was brought by the creditors, and David Blair claimed a considerable sum as due to him; when an objection was stated, that, in consequence of the proceedings already mentioned, he had become liable *gestione pro herede* for the debts of his predecessors; and therefore could not be allowed to enter into a competition with their creditors.

The question having been reported on informations, the Court were unanimously of opinion, that as, in those proceedings, David Blair had no view of appropriating the subjects, his purpose being that of discharging the debts due by his predecessors, no passive title had been incurred.

THE LORDS, therefore, "repelled the objection to the claim entered for David Blair, and remitted the cause to the Lord Ordinary."

Reporter, Lord Henderland.
Clerk, Mitchellson.

Act. Dean of Faculty.

Alt. Solicitor-General.

C.

Fol. Dic. v. 4. p. 42. Fac. Col. No 178. p. 361.

SECT. IX.

Apparent Heir paying his predecessor's Debts.

1628. January 26. COMMISSARY OF DUNKELD against ABERCROMBY.

THE voluntary payment of the father's debts makes not the payer to be heir.

No 77.

Fol. Dic. v. 2. p. 32. Auchinleck, MS. p. 2.

* * * Durie's report of this case is No 38. p. 3502. *voce* DILIGENCE.

No 76.
with a view
of preserving
the effects,
no passive
title is incur-
red.

No 78.

1629. February 14. DOUGLAS against LAWSON.

IN an action pursued by Henry Douglas against John Lawson, Boghall's brother, whom he pursued as heir to his brother, &c. he verified him to be heir, in so far as Mr Lewis Stuart being infest in wadset in a tenement in Edinburgh belonging to Boghall, he set a back-tack of the same to Boghall and his heirs, for payment of so much as effeired to his annualrent, of which back-tack duty the said John Lawson had taken discharges from Mr Lewis since his brother's decease.—THE LORDS found this relevant to make him heir.

Fol. Dic. v. 2. p. 32. Spottiswood, (HEIRS.) p. 140.

* * * Auchinleck reports this case :

AN apparent heir, who received a discharge of the duties contained in a back-bond, set by a wadsetter to his predecessor, to whom he is apparent heir, is found *gessisse pro herede*.

Auchinleck, MS. p. 3.

No 79.

1632. December 18. A. against B.

IF an executor, being minor, and after the confirmation of the testament become major, and in his majority pay as executor, or transact with any party for a legacy left to them in the said testament, by his deed he undertakes the said testament, and subjects himself to pay the rest of the legacies, so far as the defunct's free gear will extend.

Auchinleck, MS. p. 148.

No 80.

1682. December 16. THOMSON against ANDERSON.

AN apparent heir being convened upon his passive title, that, by a letter to the defunct's debtor, he desired him to pay what he owed the defunct, to one of his, the defunct's creditors, and obliged himself to warrant the payment ; because an apparent heir's uplifting heritable debts to pay the defunct's debt, is a behaviour ; and any body's uplifting of moveable debts for such an end, is vitious intromission ; and the appointing of a debtor to apply the payment such a way, is equivalent to the so uplifting and applying ;

Answered for the defender ; Intromission only with something in the defunct's possession at his death, doth infer a passive title, which cannot be charged upon the defender, who did not intromit with or give up the debtor's

bond, or discharge the debt, but only interposed with him to satisfy such a creditor, by obliging himself to warrant secure the debtor; so that the money paid was not properly the defunct's, seeing the debtor's remained after the payment.

THE LORDS assoilzied from the passive title.

Fol. Dic. v. 2. p. 32. Harcarse, (HEIRS GESTIO and PASSIVE TITLES.) No 38. p. 9.

No 80.

SECT. X.

Serving Heir inchoated, but not completed.

1594. November 26.

A. against B.

No 81.

A RETOUR extracted and subscribed by the Sheriff-clerk, albeit it be not past the Chancellory, will prove a man heir to his predecessor *passive*.

Fol. Dic. v. 2. p. 33. Haddington, MS. No 433.

* * Similar decisions were pronounced, 7th December 1621, Clark against Balgony, No 56. p. 2728.; and 16th February 1627, Simpson against Balgony, No 57. p. 2729. *voce* COMPETENT.

1628. November 22.

GOODLET against ADAMSON.

No 82.

In an action Goodlet against Adamson, one being convened as heir to his father, and for verifying him to be heir, a sentence and ward of court of the town of Glasgow being produced, whereby he was recognosced in their court, by testimony of witnesses, to be eldest son and heir to the defunct; this act was found not to prove him to be heir, albeit it was used to prove *passive* against him; seeing there was no sasine following upon the said act given to the defender produced in this process; for, without sasine had followed upon the act, the same alone was found not to prove, likeas the defender was minor the time of that act; but that was not the cause of the decision, seeing the act stood against him, if it had been otherways in itself lawful, for it was alleged that he had then curators. See PROOF.

A sentence of Court within burgh, whereby the defender was recognosced by testimony of witnesses, to be eldest son and heir to the defunct, was found not to prove him to be heir *passive*.

Fol. Dic. v. 2. p. 33. Durie, p. 430.

*** Spottiswood reports this case :

No 82.

In an action of registration pursued by N. Goodlet against John Adamson, as heir to his father, the pursuer produced to verify the defender to be heir, an act of court of the Bailies of St Andrews, bearing, that, by sentence and ward of court, John Adamson was recognosced to be heir to his father James, whereupon the said John's procurator asked instruments.—THE LORDS thought not this sufficient to prove one heir, thereby to infer any action against him.

Spottiswood, (HEIRS.) p. 139.

No 83.

1670. June 28.

ELIES against CARSE.

THE taking out briefes from the Chancery, in order to serve heir, was found not a behaviour, the same not having been followed out.

Stair. Gosford.

*** This case is No 27. p. 9668.

SECT. XI.

Behaviour upon Act of Sederunt 1662.

No 84.

1662. January 22. GLENDONWYNE against The EARL of NITHSDALE.

An apparent heir having granted a simulate bond, in order to lead an adjudication of his predecessor's estate, his intromission, by virtue of this title, was not reckoned a behaviour, being *singulari casu*, and not as heir.

GEORGE GLENDINNING pursues the Earl of Nithsdale, as lawfully charged to enter heir to his father, for fulfilling his father's bond. It was *excepted*, That the Earl was content to renounce. It was *answered*, That he could not renounce; because he had given bond to the Earl of Dirleton, whereupon, to his own behoof, his father's estate was adjudged from him; to which adjudication the defender was assigned by Dirleton, and he thereupon infest, and in possession. It was *replied*, That the defender might nevertheless renounce; because nothing could hinder him but *gestio pro barede*, or some other passive title, which, by the law of Scotland, could make him heir, or behaving himself as heir, &c. But so it is, that the granting of the foresaid bond is not such a passive title; but, on the contrary, implies a direct mind, that he intends not

to be heir to his father, but to enjoy his estate *singulari titulo*; and he is content it be declared, that the adjudication shall not prejudice his father's creditors; and offered, that, notwithstanding thereof, and of other rights of comprising acquired by him of his father's estate, he should be countable for his intromission, and for all lands he has sold, and other benefit he could make thereby, he being satisfied for what he had truly paid out therefor. It was *duplied*, That the adjudication upon the defender's own deed, acquired by himself, was a fraudulent acquisition of his father's estate, and his intromission and disposing on his father's lands, by virtue thereof, was equivalent, as if he had done the same by no right at all, but as apparent heir; and if such deeds should be sustained, never man needed to be heir, or to enter heir to an estate as heir, which were most absurd, and of dangerous consequence.

THE LORDS found, that the Earl might renounce, he being countable to the creditors for his intromission, and for what he has received as the price of any lands sold or wadset by him, being the true worth thereof; and that in time coming, he should not ascribe his right and possession to the said adjudication, but prejudice of any other right of adjudication, deduced against his father, and acquired by him; he being always liable for his intromissions with the farms to his father's creditors; he being first satisfied of what he truly paid out for acquiring of the same. And the LORDS declared, that, in time coming, if apparent heirs should grant such bonds, whereupon adjudication or apprising should follow to their own behoof; or that the same at any time should return to them, or to any person to their behoof, they should be liable to their predecessors debts, as behaving themselves as heirs; and thereupon an act of sederunt was made and published.

Fol. Dic. v. 2. p. 33. Gilmour, No 29. p. 16.

* * * Stair reports this case.

1662. January 22.—GEORGE GLENDINNING of Partoun pursues the Earl of Nithsdale, for fulfilling of a contract of excambion betwixt the Earl's father and the pursuer's grandfather; and insists against the Earl, as lawfully charged to enter heir to his father. The Earl *alleged*, Absolvitor; because he offers him to renounce to be heir. The pursuer *replied*, The defence ought to be repelled, *quia res non est integra*; because the Earl has done a deed prejudicial to his renunciation, *viz.* he granted a bond for L. 2000 Sterling to the Earl of Dirlinton, only simulately to his own behoof, whereupon his father's whole estate was adjudged, and that adjudication assigned to the Earl himself, and so he having intromitted, by that simulate title, with the mails and duties of his father's lands, he hath behaved himself as heir, and cannot renounce. The defender *duplied*, That the reply ought to be repelled; because he offered not only to renounce, but also to purge that deed of his, and the adjudication of L. 2000

No 84.

Sterling, and to declare that it should not prejudice the pursuer, nor his father's lawful creditors, and that he should be countable for the price of any lands he had sold, or any rents he had uplifted. The pursuer *triplied*, That the duply ought to be repelled; because, *medio tempore*, the Earl had bought in expired apprisings with the profits of the lands. The defender *quadruplied*, That he was content to restrict any such rights to the sums he truly paid for them, and not to exclude the pursuer by them. The pursuer *answered*, That he having once behaved himself as heir, no offer nor renunciation could be received. The defender *answered*, That his intromission could not be *gestio pro barede*, because it was *singulari titulo*, and not as heir, and *in gestione* there must appear *animus adeundi aut immiscendi*. The contrary whereof is here, for the granting of the bond, and the taking right to the adjudication thereupon, was of purpose, that his intromission might not be as heir, or as immixtion, which can never be without an illegal and unwarrantable deed; but all that was here done was legal, there being no law nor custom to hinder the Earl to grant a bond, albeit *gratis*; and after Dirleton had adjudged the lands, there was no law to hinder the apparent heir to take assignation thereto, and bruik thereby, more than a stranger; and albeit there were simulation or fraud, that might be a ground to reduce upon, but not to infer a general passive title, to make the defender liable to all his father's debts, from which passive title, *qualis coloratus titulus excusat*; and albeit this passive title be not any where else in the world but in Scotland, yet it was never applied to this case now in question, but by the contrary, since the act of Parliament 1621, by which heirs may be charged to enter heirs to their predecessors, not only for the defunct's debts, but their own, any bond granted by the apparent heir, although *gratis*, would be valid, to apprise or adjudge the defunct's estate; and, therefore, there being many cases, in which the apparent heir could not probably know whether the heritage would be hurtful or profitable; this hath been oftentimes advised, as the remeid, by Sir Thomas Hope, and many since, that the heir apparent might grant a bond, and thereupon the lands being adjudged, might take right thereto. The pursuer *answered*, The defender had intromitted with the rents of his predecessor's land, which, albeit not *animo adeundi*, yet *animo immiscendi et lucrandi*, which cannot be maintained by a simulate null bond by himself to his own behoof, and adjudication thereupon; and if this were sustained, no person would ever after enter heir to his predecessor, but take this indirect way, to the defraud and vexation of creditors; and entering so to possess, would buy in other rights, and maintain his possession, as this defender hath done, and would not be obliged or willing to restrict these rights, as he doth.

THE LORDS, after long consideration and debate in the matter, found the Earl's offers relevant; but resolved to make and publish an act of sederunt against any such courses in time coming; and declared, that it should be *gestio pro barede* to intromit upon such simulate titles.

Stair, v. 1. p. 86.

1676. July 19. & December 13.

NEVOY *against* LORD BALMERINO.

No 85.

IN the case Glendinning *against* Earl of Nithsdale, *supra*, an apparent heir having granted a simulate bond, in order to lead an adjudication of his predecessor's estate, his intromission, by virtue of this title, was not reckoned a behaviour; but, upon that occasion, the LORDS made the act of sederunt, 28th February 1662, declaring, that it should be *gestio pro barede* to intromit upon such simulate title, whether the apprising was expired or not. This act was extended to intromission had in virtue of an apprising led upon the apparent heir's just and true debt, contracted by him before he became apparent heir, without any view to be the foundation of an apprising against the predecessor's estate.

Fol. Dic. v. 2. p. 33. Stair. Dirleton, Gosford.

* * * This case is No 51. p. 9694.

1676. November 8.

JEFFRAY *against* MURRAY.

No 86.

A PARTY being pursued upon the passive titles, and in special upon that of charged to enter heir; and having offered to renounce, it was *replied*, That he could not, seeing *res* was not *integra*, in respect he had granted a bond, of purpose that thereupon the estate might be adjudged; the LORDS found, that, albeit he had not granted the bond upon the design foresaid, yet, the estate being adjudged and incumbered by his deed, he ought to be liable to the defunct's creditors *pro tanto*, or to purge.

It is thought, that if the apparent heir should *dolose* grant a bond, that the defunct's estate might be thereupon adjudged, he ought to be liable *in solidum*; but if he grant a bond which is a lawful deed, and thereupon his creditor adjudge, which he could not hinder, it is hard to sustain a passive title against him; unless his creditor, having adjudged, were satisfied by that course; in which case, seeing the defunct's creditors are prejudged, it is reason he should be liable *pro tanto*.

Fol. Dic. v. 2. p. 33. Dirleton, No 380. p. 185.

Clerk, Gibson.

No 86.

* * * Stair reports this case.

IN a process betwixt Jeffray and Murray, the defender being pursued as lawfully charged to enter heir for a defunct's debt, offered to renounce; the pursuer *answered*, That a renunciation is not relevant, unless it were made *re integra*. But, in this case, the defender hath granted bond for her proper debt, whereupon the defunct's heritage is appraised or adjudged, and whereby the pursuer will be excluded or postponed. It was *replied*, That the granting of the bond by an apparent heir, though apprising or adjudication followed, doth not infer the passive title of behaviour, unless the apparent heir take right to, and intromit by the said adjudication or apprising, as is clear by the act of sederunt upon the Earl of Nithsdale's case, No 84. p. 9738. the 28th day of February 1662. It was *duplicated*, That the general passive title of behaviour, making the apparent heir liable to the defunct's whole debt, is not here insisted upon, but the passive title of charged to enter heir, which reaches only to the debt, whereupon the charge is raised, and which is elided by a renunciation *re integra*, which cannot be where the defunct's heritage is affected for the apparent heir's proper debt.

THE LORDS found the reply relevant, that the defunct's heritage was affected for the apparent heir's proper debt, by apprising or adjudication, to exclude the apparent heir's renunciation, and to make her liable for this debt, unless she purge the apprising, or adjudication of the defunct's heritage for her own debt, it not having been the defunct's debt.

Stair, v. 2. p. 460.

1682. November 3. HENRY BLYTH against JAMES LAWSON.

No 87.

MR HENRY BLYTH being a creditor of umquhile James Lawson of Brotherstones, intents process against James Lawson, as lawfully charged to enter heir to umquhile James Lawson, his father, the debtor, and as he who being liable to his brother and sister for L. 1000, and also, as having granted bond to one Dunlop for a certain sum of money, upon both which grounds, there was a comprising of his father's lands of Brotherstones led against him; the ground of this action was, that he had suffered his father's estate to be comprised for his own debt, and so Blyth, a creditor of the father's, was secluded. It was *alleged* for the defender, That the Earl of Nithsdale's practise (*supra*) was only in the case where bonds were granted by the apparent heir, whereupon comprising of the defunct's estate was deduced for the heir's behoof; but, in this case, the comprising was not to the defender's behoof, neither has the pursuer done diligence to affect the estate *debite tempore*. THE LORDS found, that, albeit there was no

fraud nor dole, and that the comprising was not to his own behoof, yet that the defender ought to be liable to the pursuer's debt, so far as the sum contained in the apprising might extend to; or, otherways, he ought to purge the said apprising, to the effect that the pursuer, who was the father's creditor, might have access to the lands comprised, which was the father's estate, without being incumbered with the foresaid comprising, which proceeded upon the son's debt.

No 87.

Fol. Dic. v. 2. p. 33. P. Falconer, No 23. p. 12.

* * * Harcarse reports this case.

1682. *December*.—AN apparent heir having granted a bond for a small sum, whereupon his predecessor's estate was apprised from him, as specially charged to enter heir; the apprising happened to expire, and the said apparent heir being charged to enter heir at another creditor's instance, he offered to renounce.

It was *alleged* for the creditor, That *res* not being *integra*, he cannot renounce, till he purge the land of the expired apprising, whereby a great estate is carried away for an inconsiderable sum.

Answered for the apparent heir, That he was willing to pay the sum contained in the bond, on which the apprising proceeded, which had not expired, if the pursuer had redeemed within the legal; and so *per eum stetit*.

THE LORDS repelled the apparent heir's answer, and found, that he ought to purge the apprising, or be liable to a sum equivalent to the worth of the land.

Harcarse, (COMPRISINGS.) No 281. p. 66.

SECT. XII.

Behaviour upon Act 1695.

1710. *June 7.*

WATSON *against* BROWN.

My Lord Royston, as Probationer, (in place of Lord Prestonhall, who had demitted,) reported Watson against Brown. Captain Brown in Leith being debtor to Watson of Saughton in 2000 merks by bond, he pursues Alexander Brown, merchant in Edinburgh, his eldest son, on this passive title, introduced

No 88.

An apparent heir's intromission with the mails and duties of his

No 88.

predecessor's lands, after his death, relevant to make him universally liable for the defunct's debts, although the apparent heir intromitted by virtue of a singular title, acquired by him in the defunct's lifetime.

by the 24th act 1695, that his father being debtor to the Kirk Session of Leith, he had given them infeftment in his houses there, which right he had purchased and bought in; and, by virtue thereof, had possessed and intromitted with the mails and duties of the lands after his father's death, and so is liable *passive* by the said act. *Alleged*, My case noways falls under the act of Parliament, which only obviates the fraud of apparent heirs to wrong their predecessor's creditors; but so it is, I purchased in this right in my father's lifetime, and did it *ex pietate filiali* to save him from distress. Likeas, it was not a subject by which I could enter into possession, being only an infeftment of annualrent; and to shew he has no purpose to defraud any creditor, he is willing to renounce his right to any that will pay him what he gave for it, and refund his expenses in repairing the damage done to the brewhouse and kiln by the accidental powder blast in 1702. *Answered*, The act 1695 is opposed; and there is no difference whether it be acquired in his father's lifetime or since, both being alike prejudicial to the creditors. And in a parallel case, where the 62d act 1661 provides, that where apparent heirs buy in debts, affecting their predecessors estates, they shall be redeemable from them within ten years after the acquisition, on payment of what they gave for it, the LORDS have extended this to purchases made, when their father is yet alive, as was found on the 19th June 1668, Burnet and Naesmith against Naesmith, No 48. p. 5302.; and if the transacting their debts were once allowed, the act should be altogether elusory and ineffectual; and as to the right's being incapable of possession, it was positively offered to be proved, that he uplifted the mails and duties of these lands, and was in the natural possession since his father's death; and *esto* it were a correctory law, yet this is no extension, but a plain interpretation of the sense and meaning of the statute. THE LORDS thought, if it was an infeftment of annualrent, it could not be the subject of possession; but the right not being produced, they determined the relevancy of the allegiance as it was proponed before them; and found it relevant to make him liable *passive* that he intromitted with the mails and duties of the lands, wherein his father died infeft, and that after his father's decease, though he purchased the same in his lifetime; for they considered law had provided him two remedies, and he had made use of neither, *viz.* bringing his father's lands to a judicial roup, where he was as free to bid as another; and the entering heir *cum beneficio inventarii*. And though one is not properly apparent heir, but only presumptive in his predecessor's lifetime, there being no *hereditas viventis*, yet it may tend as much to the defraud of creditors to buy in rights in his father's lifetime as afterwards; and, therefore, the LORDS decided *ut supra*.

1711. *January 17.*—IN the cause mentioned *supra*, 7th June 1710, pursued by Watson of Saughton against Alexander Brown, for payment of a debt contained in his father's bond, upon sundry deeds of *gestio pro herede*, by lifting

the mails and duties, building houses, &c. and an act of litiscontestation being extracted upon these acts of possession, and a probation led;—but Saughton, the pursuer, being diffident of overtaking him on these heads, calls of new his process, and insists against him on the other passive titles libelled, as lawfully charged to enter heir, as vitious intromitter, &c. It was *contended* for Brown, the defender, That there being an act of litiscontestation already made in the cause and extracted, with diligence raised thereon, and witnesses examined upon his intromission, and the term circumduced *quoad ultra*, that must terminate the process; and he cannot be permitted to recur to his libel, and insist on the other passive titles not debated in the act, and so were *simpliciter* passed from, unless he had declared he insisted *primo loco* on the behaving, and that the rest had been reserved; and if it were otherwise, then there might be more acts of litiscontestation in one cause, and a *progressus in infinitum*, contrary to all good order and form, so that on every article of the libel a new act may be extracted, and there shall never be *fnis litium*, nor termination of pleas; whereas, an act of litiscontestation is a novation, *et quasi contractus inter partes litigantes*, and they lay the whole cause on the points therein contained, to which they circumscribe themselves. And the Doctors, speaking of litiscontestation, call it the *basis et fundamentum totius judicii, cui omnia innituntur acta quæ sunt quasi vehiculum ad sententiam, et adeo partes obligat ad instantiam ut ab ea quis discedere ampliusque pænitere non possit, Vide l. 25. D. De rei vindicta. l. 52. D. De judic.* So that after it, *libellus mutari seu emendari nequit.* And Hope, in his Lesser Practiques, cap. 1. lays it down as a principle, that, after litiscontestation, no new defence can be proponed, unless it be *noviter veniens ad notitiam*; so also Stair, B. 40. T. 4. says, litiscontestation fixes all the points in debate betwixt the parties; so they may not return to allegiances there omitted. *Answered*, There is nothing more ordinary in our stile than to cumulate more actions in one summons, as exhibitions, delivery, reductions, declarators, count, reckoning, and payment, mails and duties, constitutions and adjudications; and the insisting in one of these *media concludendi* never absorbs nor precludes the other;—and the Roman litiscontestation and ours are *toto cælo* different; and the feudal, canon, and municipal laws, have quite altered these ancient forms. None will say an act extracted exhausts the libel, so as they cannot be insisted for in a new summons. Now, *quorsum* should we multiply actions? Is it not more the lieges' interest to receive it as a part of the first libel? THE LORDS found the extracted act of litiscontestation did not debar the pursuer from returning to the other branches of his libel, and his insisting therein; and so repelled Brown's allegiance of incompetency *in hoc statu*.—*See PROCESS.*

Fol. Dic. v. 2. p. 34. Fountainhall, v. 2. p. 574. & 626.

* * * Forbes reports this case.

No 88.

1710. *June 7.*—IN a process at the instance of James Watson of Saughton, as heir to his father, against Alexander Brown, the defender was found liable upon the 24th act Parliament 1695, to pay to the pursuer 2000 merks, with annualrents and penalty, contained in a bond granted to his father, by Captain Brown, maltman in Leith, father to the defender, upon this ground, that the defender had intromitted with the mails and duties of his father's lands, after his decease, notwithstanding of a singular title of intromission, acquired by him in the father's lifetime; in respect the act 1695 declares, that any apparent heir entering to possess his predecessor's estate, or purchasing any right thereto, by himself, or any other way than as highest offerer at a public roup, without collusion, shall be liable as if he were heir served; albeit it was *alleged* for the defender, That the statute for obviating the fraud of apparent heirs relates only to rights purchased by them after their predecessor's decease; and he got the right in his lifetime, when he could not serve heir to him; seeing: *nulla est hæreditas viventis*.

1711. *January 16.*—IN the action at the instance of James Watson of Saughton against Alexander Brown, as representing his father, for payment of 2000 merks, owing by the father to the pursuer; he, the pursuer, repeated the common passive titles, and particularly insisted against the defender upon the act of Parliament 1695, as liable for intromitting with his predecessor's estate, without bringing the same to a roup; and the LORDS, 7th June last, having sustained his intromissions subsequent to his father's death, relevant to make him liable *passive*, the pursuer extracted an act upon that point; but finding it hard to prove the intromission, did put up the cause in the hand-roll of my Lord Cullen, who pronounced the act, and, at calling, insisted upon the other passive titles libelled, which he referred to the defender's oath.

Alleged for the defender, There being an act already extracted upon one passive title, the pursuer could not now recur to the rest, though libelled; because, in ordinary actions, there is but one act of litiscontestation; and, if the pursuer were now suffered to recur to other passive titles, there might be multiplicity of acts of litiscontestation, and no *terminus litis*. After an act of litiscontestation, the Ordinary is *functus*, and cannot review or return to the libel, conform to *L. 25. D. De Rei Vindicatione*; *L. 52. D. De Judiciis*, *L. 3. § 11. D. De Pecul.* *L. 57. D. De Solut.* *L. 20. D. De Petit. Hæred.* Hope's *Pract. Min. Tit. 1. Stair, Instit. B. 4. T. 40. § 16*.

Replied for the pursuer, *imo*, The insisting in one of several *mediums* in a libel did not exclude the pursuer from insisting afterwards upon the rest; for the act of litiscontestation doth circumscribe the parties only in so far as litiscontestate; whereas, here, the act of litiscontestation is only concerning the

clause in the foresaid act of Parliament, which the pursuer desires no review of. Yea, there is nothing more ordinary than to libel not only several conclusions in one summons, but also separate actions; and, as insisting in one of such accumulative actions cannot hinder to insist in the other; far less can the insisting particularly upon one of several *media concludendi*, in one summons, cut off the rest. *2do*, It is unnecessary to answer the defender's citations out of the civil law, since the form of process among the Romans differs from ours. And the citations out of Hope and my Lord Stair, about the effect of litiscontestation, doth only concern what is litiscontestate, which the pursuer doth not quarrel.

THE LORDS found, that the pursuer may yet insist upon the other passive titles; and remitted to the Ordinary to hear parties thereon.—*See PROCESS.*

Forbes, p. 405. & 476.

1714. November 24. THOMAS MERCER *against* ROBERT LEITH.

An apparent heir accepting a disposition to heritable sums from his father, found liable to his father's creditor, conform to the 24th act, Parl. 1695.

THOMAS MERCER pursues Robert Leith, as representing James Leith his father, for payment of the sums contained in two bonds, granted by Dickson of Westbinnie, Mr John Montgomery, and the said James Leith, to which the pursuer has right by progress; and insisted on this passive title, that the defender accepted a disposition from his father to certain heritable sums of money, and thereby became liable conform to the act of Parliament 1695; which the Ordinary having sustained, the defender offered a reclaiming bill, on these reasons; *1mo*, The defender's father's disposition was only an inconsiderable heritable sum; *2do*, The act of Parliament relates only to purchases made by apparent heirs, that is, heirs to whom the succession is devolved by the death of his predecessor: Although the acquisition had been from a stranger, and to a much more valuable right, made in the father's lifetime, it would not have been in the case of the act of Parliament, which bears. 'That if any apparent heir without being lawfully served, &c.' which, and all the cases there related do only concern apparent heirs to whom the succession is devolved. And the act of Parliament 1661, prorogating the legal of apprisings purchased by apparent heirs, was never extended to such purchases made in the lifetime of the predecessor. It is true, in the case the 7th June 1710, Watson against Alexander Brown, No 88. p. 9743. observed by Mr Forbes, it was otherwise found; but that decision is marked very short, and being the interpretation of a correctory law, deserves to be the more maturely considered.

It was *answered*; The disposition made by the defender's father, is not of a small subject, but of many sums, and indeed the substance of what his father had, and reserving his father's liferent; so that although the acquisition was in his father's time, yet the possession was calculated to begin after his father's de-

No 89.

cease, when the succession was devolved to him, which falls clearly under the words of the 24th act of Parliament 1695, declaring, that an apparent heir entering to possess his predecessors estate, or purchasing any right thereto otherwise than by a public roup, shall be liable as if he were heir served: and if it were otherwise the act of Parliament would be easily eluded, either by acquiring a disposition from the predecessor and pretending an onerous cause, as in this case, which strangers could not disprove, or by acquiring rights from third parties in the father's lifetime; and the Lords in the interpretation of all laws do consider the design of the law, which they will not suffer to be evaded by the contrivances of apparent heirs; and thus it was found in the case of Watson against Brown upon full debate, and very unanimously, and a reclaiming bill refused; and for the same reason the right of an expired comprising acquired by an apparent heir in his father's lifetime, was found to be redeemable at the instance of his father's creditors upon the act of Parliament 1661, 19th June 1668, Burnet of Carlops against Nasmyth, No 48. p. 5302.

THE LORDS repelled the defence.

Fol. Dic. v. 2. p. 34. Dalrymple, No 117. p. 164.

1745. June 26.

CREDITORS OF M'CAUL against M'CAUL.

No 90.

THE liferenter's possession found not to be the fiar's possession in the sense of the act 1695, not only as it is a corrective law *et strictæ interpretationis*, but for this more special reason, That in no case the possession of the liferenter is held to be the possession of the fiar, but where the liferenter's possession tends to the fiar's benefit, as where prescription runs in his favour by the liferenter's possession, or the like.

Kilkerran, (PASSIVE TITLE.) No 7. p. 371.

. D. Falconer reports this case.

1745. June 25.—HENRY M'CAUL merchant in Glasgow, married Janet Cliemy daughter and heiress of James Cliemy merchant there, and she in their contract of marriage disposed to him certain tenements in Glasgow, reserving to her mother her liferent thereof; but there were no titles made up in the person of Janet Cliemy, who predeceast her mother or her husband.

After Henry M'Caul's death, his creditors pursued John M'Caul his son, and adjudged from him both his father's proper estate, and what had come by his mother.

He raised a reduction, on the head of minority, of the decreets finding him personally liable, offering yet to renounce, and likeways of the adjudications of the subjects belonging to his mother; and the Lord Ordinary, 12th December 1744. " Found the reasons of reduction on the head of minority and le-

tion, relevant, and in respect the minority was not denied, reduced the decreets of constitution and adjudication quarell'd, obtained against the pursuer, in as far as these decreets for his father's debts, might or could affect the pursuer's person, or the estate descending to him from his Grandfather, by the mother, or any estate which might belong to him, other than the lands and estate which belonged to his father the contracter of the debts, to whom the pursuer renounced to be heir. And 11th instant, found that the possession of the Grandfather's widow was not to be considered as the possession of Janet Cliemy the apparent heir, so as to subject John M'Caul, who had passed her by, to the consequences of the act 1695."

No 90.

Pleaded in a reclaiming bill, That the wife was apparent heir, and three years in possession; and therefore her disposition to her husband must be effectual in favour of his creditors; nor can the son passing by his mother, serve to his remoter predecessor, without being subject to her deeds; for the subjects were possessed by the liferentrix, and the liferenter's possession is reckoned in law to be the fiar's, and will be effectual to acquire him the property by prescription, the civil possession being in the fiar, *l. 12. pr. D. De acquirenda vel amittenda possessione, Voet. super eo titulo § 3.*

The law regards the *bona fides* of creditors who trust upon the notoriety of the succession's having devolved; and this notoriety is equal from the possession either of fiar or liferenter.

The possession of the liferenter ought especially to validate the deeds of the apparent fiar, when he does any deed acknowledging the succession, which Janet Cliemy here did, by disposing the subject to her husband: If the fiar of lands liferented should sell the property, and receive the price, the buyer would surely have a claim to the subject against the subsequent heir; and here Janet Cliemy it to be considered as a seller, and her husband as an onerous purchaser.

THE LORDS adhered.

Pet. A. Macdowall.

D. Falconer, v. 1. p. 108.

1752. July 24.

PITCAIRN against LUNDIN.

No 91.

IT was in this case found, That the years of an apparent heir's possessing a subject liferented, do not come *in computo* of the three years possession, which the act 1695 requires to make the apparent heir liable to the debts of the preceding apparent heir.

Fol. Dic. v. 4. p. 43. Kilkerran, (PASSIVE TITLE.) No 11. p. 373.

*** This case is reported in the Faculty Collection :

No 91.

IN the year 1707, Robert Lundin granted a bond for 400 merks, to which Anne Pitcairn the pursuer obtained right by progress. Upon this bond she sued James Lundin of Lundin his son ; and set forth, that Robert possessed the estate of Lundin for more than three years, and was, during that time, apparent heir ; that therefore the defender is liable to pay his debts to the extent of the value of the estate, in pursuance of act 1695, Will. Sess. 5. cap. 24.

The defender set forth, That by contract of marriage between Sophia Lundin his grandmother, and John Drummond afterwards Earl of Melfort, Margaret Lundin, mother to Sophia, settled her estate upon the wife and husband, and longest liver of them, and the heir-male procreated betwixt them ; with a long series of heirs, under a strict entail : That, upon this settlement, a charter under the great seal was expedite in 1674, and Sophia and her husband were infeft : That, in the year 1695, the Earl of Melfort was attainted of high treason by the Parliament of Scotland, with a salvo, that the attainder should not taint the blood of his children by the said Sophia : That James Lundin, eldest son of the said marriage, received from the crown a right of the said estate as supposed to be forfeited by his father's attainder : That upon James's death, Robert his brother was served heir in special to him, and infeft : That it came afterwards to be discovered, that only the liferent of the estate of Lundin was in the Earl of Melfort ; and therefore, that no more than the liferent was forfeited to the crown ; whereupon Robert, in 1707, obtained a new grant from the crown of the Earl of Melfort's liferent ; and by virtue thereof possessed the estate until the Earl's death in the 1714, and thereafter continued his possession until his own death in the 1716.

John, the eldest son of Robert, being advised, that no other right was vested in his father than the Earl of Melfort's liferent, made up his titles as heir to Sophia his grandmother. Upon his death, James his brother, the defender, was in like manner served heir to him, and infeft.

Upon this state of the facts, the said defender, without producing or founding upon the entail in the contract of marriage, pleaded, That his father Robert's possession during the Earl of Melfort's life, was not as apparent heir, but as donee of the Earl's liferent : The possession in that period was the possession of the liferenter : Robert the granter of the bond was in the situation of an apparent heir, who had got a lease from an universal liferenter, and had possessed in virtue thereof.

Replied for the pursuer, That, admitting the facts with respect to the forfeiture to be true, Robert was certainly apparent heir, and did possess the estate for upwards of three years : If so, his obtaining a collateral right would not exempt him from falling under the description of the statute : That this statute ought to be beneficially interpreted in favour of creditors : The other clauses

of it make possession of the predecessor's estate, by any other right than as purchaser at a public roup, an universal passive title against the apparent heir with respect to his predecessors debts: It is therefore not supposable, that the first clause would intend to give so easy an evasion of the apparent heir's own debts, where only a limited passive title is incurred.

It was observed on the bench, than an apparent heir would be liable on the statute, under whatever title he might possess, provided there was access for him to possess as apparent heir. But here there was no such access.

Found, " That the possession of Robert Lundin, the immediate heir, during the subsistence of the forfeiture of the Earl of Melfort's liferent, cannot be brought *in computo* of three years possession; reserving to parties to be heard how far he possessed for three years after the expiration of the liferent.

Act. Alex. Lockhart.

Alt. Ro. Craigie.

Clerk, Gibson.

S.

Fac. Col. No 31. p. 50.

* * * Lord Kames also reports this case:

In the contract of marriage betwixt the heiress of Lundin and John Drummond, afterwards Earl of Melfort, the estate of Lundin was settled upon the husband and wife, and the heirs-male of the marriage; which failing, to her heirs. In the 1695, the husband was attainted of high treason, whereby his liferent fell to the Crown, of which a gift was procured in favour of Robert Lundin the heir of the marriage. Upon this title Robert possessed the estate till the year 1714, when his father died. He continued his possession as heir apparent to his mother the heiress till his death, which happened in the year 1716.

James Lundin having made up his titles to the estate, as representing his grand-mother the heiress, was called in a process to answer for the debts of Robert Lundin the interjected apparent heir. The defence was, That Robert's possession till the year 1714, was not as apparent heir, but as donatar to his father's liferent; and that he did not possess three years afterwards *qua* apparent heir. It was *answered*, That the purpose of the statute 1695, was to protect persons ignorant of law, who, furnishing goods to a man representing a family, and possessing the estate, ought not to be entrapped in the subtilties of law; which must happen if the title of possession is to be weighed with the same nicety in this case, as where the question is of an universal representation. *Replied*; This consideration may possibly so far weigh as to bar the pretext of a singular title, which is partial, or which may consist with the possession of the apparent heir. But here the Earl's liferent being total, was a total bar to any other possession, and made it impracticable for the apparent heir to possess while it subsisted. Therefore the purchase of this liferent by Robert the apparent heir, cannot be constructed a blind to cover his possession *qua* apparent heir.

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THE LORDS found, " That Robert Lundin having possessed the estate three years, not as apparent heir to his mother, but as donatar to his father's liferent, this case does not fall under the act 1695."

Sel. Dec. No 18. p. 20.

1759. July 20.

JAMES MACNEIL, Deputy Collector of the Customs at Greenock, *against*
MARGARET MATTHIE, Relict of William Taylor.

No 92.

An adjudication acquired by an apparent heir, and possession assumed upon it during his father's life, is not reducible on the act 1695.

ALEXANDER TAYLOR was possessed of a house in Greenock; for attaching which, an adjudication was led in the year 1709, at the instance of one of his creditors, Lilius Morison, for the accumulate sum of L. 387 Scots. The adjudger obtained a charter from the superior, and was infeft in the year 1713. In the year 1719, another adjudication was led at the instance of another creditor, Magdalen Bryce, for the accumulate sum of L. 510. 19 : 6 Scots.

William Taylor, the eldest son of Alexander, purchased these two adjudications from the creditors in the years 1721 and 1724; and entered to the possession of the house during the lifetime of his father. In the year 1725, his father being still alive, he obtained a declarator of expiration of the legal upon the first adjudication led in 1709.

William Taylor having married Margaret Matthie, he executed, upon the 1st June 1741, a postnuptial contract of marriage with her, by which he conveyed this house, and other subjects, to himself and his wife in conjunct fee and liferent, and to the children of the marriage in fee.

After the death of William Taylor, his relict continued the possession of the subject without challenge, till James Macniel, as having right to an adjudication led in the 1726, against the same subject, upon a debt due by Alexander Taylor, brought a process of reduction of the two adjudications upon which William Taylor's right was founded, *insisting*, That as they were acquired by William Taylor, the eldest son of Alexander the debtor, and were the title under which he possessed after his father's death, they fell under the sanction of the second clause of the act 1695, which declares, That every such adjudication shall be reputed a behaviour as heir; and that consequently the diligences, by coming into his person, became extinguished *confusione*; at least that they could not stand in competition with the onerous creditors of his father.

The second clause of the act 1695 is in these words: ' If any apparent heir for hereafter shall, without being lawfully served or entered heir, either enter to possess his predecessor's estate, or any part thereof, or shall purchase, by himself, or any other for his behoof, any right thereto, or to any legal diligence or other right affecting the same, whether redeemable or irredeemable, otherwise than the said estate is exposed to a lawful public roup, and as the highest offerer thereat, without any collusion, his foresaid possession or purchase

' shall be repute a behaviour as heir, and a sufficient passive title to make him represent his predecessor universally, and to be liable for all his debts and deeds, sicklike as if the said apparent heir possessing or purchasing, as said is, were lawfully served and entered heir to his said predecessor; declaring always, That the said apparent heir may bring the said estate to a roup, whether the estate be bankrupt or not.'

Answered for the defender, *1mo*, The words of the statute appear to apply only to the case of a proper apparent heir entering to possess, or acquiring debts, after his predecessor's death. The designations of predecessor and apparent heir are correlative terms. It is absurd to call a man a predecessor while he is alive; and it is improper to design his son apparent heir during that period. The apparent heir who comes under the sanction of this clause of the act 1695, is described to be one who has it in his power to serve or enter heir, and, in place of taking that method, chuses to enter to possess his predecessor's estate, and to purchase legal diligences affecting it. To apply any of those things to a son during his father's life, is impossible. It cannot be said, that he neglects to serve or enter heir; and it would be equally absurd to say, while his father is alive, that he is possessing his predecessor's estate. Further, the possession or purchase is declared to be reputed a behaviour as heir, and a sufficient passive title to infer a representation of the predecessor universally; but a behaviour as heir will only apply to one who has it in his power to enter to a predecessor who is dead; for it is impossible to represent a predecessor universally while he is alive, or to be liable in all his debts and deeds, the extent of which cannot be known till his death; and the manner of the representation is described in the statute to be the same as if the apparent heir possessing or purchasing were lawfully served and entered to his predecessor, which supposes him capable of entering heir at the time of the purchase; and the clause concludes with allowing the apparent heir to bring the estate to a roup; which evidently supposes, that the predecessor is then deceased.

2do, The words of this statute ought not to be extended beyond their proper meaning; because the sanction is extremely severe, depriving the apparent heir, not only of all benefit from the acquisition he may have made, but condemning him in an universal representation. The statute is also a correctory law; and upon that account likewise ought not to be extended. Accordingly the Court has restricted the general words, debts and deeds, made use of in the first clause of the statute, to such debts or deeds as are strictly onerous, to which alone the heir passing by is subjected; and the Court has also refused to extend the first clause of the act to the case where an apparent heir possesses the estate without making up any title; and these constructions of the statute have been confirmed in the last resort.

3tio, The consequences of extending this penal clause would be extremely severe. If a son or a younger brother happens, by any accident, to be creditor to his father or elder brother, and does diligence against their lands, and

No 92. enters into possession for payment of his debt ; this creditor, by extending the clause to possession attained during the predecessor's life, would be subjected universally to the whole debts of his father or brother, not only such as they have then contracted, but also what they may thereafter contract at any time in their life.—Further, if a father, as is very common, happen to dispoñe a part of his lands to his eldest son, when he comes to be of age, or when he enters into marriage ; by such construction, if the father afterwards contract debt, the son, by entering to possess, though during his father's life, would be subjected to an universal representation, and liable for all such debts.

4^{to}, Supposing that William Taylor did incur a passive title by the purchase of these adjudications, or by possessing upon them after his father's death ; yet this will not be a ground for reducing these adjudications, to the prejudice of the defender, his relict, a singular successor, who must be preferred upon the adjudications, leaving the pursuer to insist in a personal action against the representatives of her husband.

Replied, 1^{mo}, If the words of the statute are taken in a strict grammatical sense, they will no doubt apply only to an heir after his predecessor's death ; but the expression, in the common use of language, applies to the case of an heir, whether his predecessor be dead or alive ; and the utmost accuracy of language is not to be looked for in the statute 1695.

2^{do}, Statutes relating to fraud are entitled to the most liberal interpretation ; and it is the duty of Judges to explain them in such a manner as to answer the intention of the legislature. This has been the practice in explaining other statutes : Particularly, the Court has, in many instances, given an extensive interpretation to the statute 1621, against unlawful alienations made by bankrupts. The statute 1661, for obviating the frauds of apparent heirs, has been explained in the same extensive manner. By that statute it was ordained, that in case the apparent heir of any debtor, or any other confident person for his behoof, should at any time thereafter acquire the right of an expired apprising, the said right should be redeemable within ten years after it was acquired by the posterior apprisers. The Court has found, that, under the words apparent heir in this statute, were comprehended presumptive heirs. It has also been found, that the purchase of apprisings during the currency of the legal fell under the intention of the act, though the words only mention expired apprisings ; and the act has been extended so as to allow, not only posterior apprisers to redeem, but also personal creditors. The statute 1661 and 1695 are extremely analogous ; and therefore ought to be explained in the same manner. Both of them were intended to prevent the frauds practised by heirs ; and the last act was only calculated to make the remedy more effectual. The statute 1695 itself has been explained by the Court in this extensive manner, in two several cases ; *Watson contra Brown* No 88. p. 9743. ; and 24th November 1714, *Mercer contra Leith*, No 89. p. 9747. ; and the same statute was

extensively interpreted by the Court as to a different clause of it, in a late case, *No 92.*
Burns contra Dickens, 4th July 1758, No 31. p. 5273.

3tio, The cases of a son becoming debtor to his father, or of a father disposing to his son upon occasion of his marriage, do not apply. The statute only relates to the acquiring diligences against the predecessor's estate, in order to carry it off to the prejudice of creditors; and it is most just, that heirs should be prohibited from all traffic of this sort, as well during the predecessor's life as after his death.

4to, The effect of the present reduction must be to set aside the adjudications in competition with the pursuer's title, because the apparent heir, who became liable on a passive title by the purchase of these adjudications, could not have set them up in competition with the pursuer; and the defender is in effect only the gratuitous disponent of the apparent heir, her husband, by a postnuptial contract of marriage, containing exorbitant provisions.

"THE LORDS repelled the reasons of reduction; and assoilzied."

Alt. *Dav. Dalrymple, Lockhart.*

Alt. *Williamson, Ferguson.*

W. J.

Fol. Dic. v. 4. p. 43. Fac. Col. No 192. p. 341.

1775. January 17. GEORGE HAY against JAMES HAY.

GEORGE HAY being creditor to the deceased John Hay in 1680 merks, by bill, brought an action of constitution and adjudication, before the Sheriff of Stirling, against the defender, as representing the said John Hay, his father. In this action, the defender renounced to be heir to his father, and he was assoilzied from the process; and the matter was allowed to lie over for several years, without any extract being taken out.

The pursuer having got notice of the defender's being since entered and infeft in the lands, wakened the process before the Sheriff, who dismissed it as incompetent, after the former absolvitor; whereupon the pursuer brought the process by advocacy into this Court; and the Lord Ordinary, upon the pursuer's restricting his action to the conclusion of constitution, pronounced an interlocutor, repelling the defence as to the competency, advocating the cause, and ordaining the defender to produce his sasine, and allowing a proof of the defender's father having been three years in possession of the lands of Bankhead, being those included in the conclusion of adjudication before the Sheriff.

The defender accordingly produced his sasine in the said lands, bearing date the 4th March 1773, and proceeding upon a precept of *clare constat* from Sir Laurence Dundas, the superior, to the defender, as heir to Agnes Binny, his great-grandmother. And, from other writings recovered out of his hands by a diligence, it appeared, that the lands of Bankhead, which belonged to Agnes Binny, were disposed by her in 1738 to Matthew Hay her eldest son,

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Found that a person passing by his father, who was three years in possession as apparent heir, and also passing by his grandfather, the person last infeft base, and making up titles to a remoter predecessor, who was the last publicly infeft in the lands, is liable for the debts contracted by his father, upon the statute 1695.

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the defender's grandfather, with a reservation of her own, and of James Hay her husband's liferent of the one-half of these lands; that the said Matthew Hay was duly infeft, on the precept contained in the disposition; and, after his death, John Hay the defender's father entered into the possession of the half which was not liferented by the said Agnes Binny and her husband, and continued in that possession for more than three years, in virtue of his apparen- cy, but died without making up any titles in his person; but the de- fender, although he at length admitted, that his father had been more than three years in the possession, rested his defence upon this circumstance, that, as his grandfather Matthew Hay was infeft in the fee of the whole lands, the precept of *clare constat*, which was taken from Sir Laurence Dundas, for in- fefting himself as heir to his great-grandmother, and the infeftment that follow- ed upon that precept, were not only inept, but totally null and void.

The words of the statute are: 'That if any man, since the 1st of January 1661, have served, or shall hereafter serve himself heir, or, by adjudication on his own bond, hath, since the time foresaid, succeeded, or shall hereafter succeed, not to his immediate predecessor, but to one remoter, as passing by his father to his goodsire, or the like, then, and in that case, he shall be li- able for the debts and deeds of the person interjected,' &c.

THE LORD ORDINARY pronounced the following judgment: "Finds it in- structed, that John Hay the defender's father, and debtor to the pursuer in the bill libelled on, was three years in possession of the half of the lands mention- ed in the libel, as apparent heir to his predecessors; and that the defender has made up titles to these lands, as heir to a remoter predecessor, passing by his said father; and, therefore, in terms of the act 1695, is liable *in valorem* of the half of the said lands, for the said debt contracted by his said father."

The defender reclaimed; and

Pleaded; In the *first* place, it is an established point, that, by the general law of this country, independent of the statute 1695, no estate could be made liable for the debts of a person who had not vested that estate in him by pro- per titles; and that, however long such person might have possessed the estate in the character of apparent heir, the next in possession was at liberty to make up his titles, by serving heir to the person who was last infeft, without being subject to any of the acts or deeds of such apparent heir.

In the *next* place, although an alteration was made in that respect by the sta- tute 1695, yet, as that statute was correctory of the former law, it must un- doubtedly fall to be strictly interpreted. And, although it should be judged to be defective, even with regard to particular cases, which the legislature may be supposed to have had in view, yet that defect cannot be supplied by courts of law, who have no authority to extend such correctory acts beyond what the words necessarily imply. It was upon this principle that the judgment pro- ceeded, in the case of Isabella Grant against David Sutherland, 12th Decem- ber 1754, affirmed in the last resort, *infra, h. t.*

It is therefore undeniable, that, if the defender had made up no sort of title to the lands in question, he could not be subjected in payment of any of his father's debts, however long he might possess these lands in the right of his apparency; and the only question at present is, Whether the titles that have been made up can make any variation upon the case? or, to speak more correctly, Whether these titles can bring him under the predicament of the penal and correctory statute 1695?

On this head, *argued*;

The penalty introduced by that statute applies only to those who, passing by the apparent heir, serve themselves heirs to their predecessor who was last infeft; but not to those who likewise pass by the person so last infeft, and serve themselves heir to a still remoter predecessor. But, in this case, the defender has made up no titles to his grandfather Matthew Hay, who was the person last infeft, but only to his great-grandmother Agnes Binny: And so the words of the statute have been uniformly understood by the writers on the law of this country, and particularly by Lord Bankton, B. 3. Tit. 5. § 104.

Nor will it avail the pursuer to allege, that putting so narrow and limited a construction upon the statute, which was avowedly meant to prevent the frauds of apparent heirs, would open a door to such frauds, to the great prejudice of onerous creditors. The fraud, if it can with propriety be called a fraud, is equally strong when the heir lies out unentered, without making up any titles; but, as the statute has made no provision in that behalf, the creditors of the immediate preceding apparent heir can make no demand. And, as the statute is equally silent with regard to the case that has here happened, the pursuer cannot show that the defender falls under the predicament of that statute, and, of consequence, can have no claim against him for payment of his father's debts.

Indeed, when it is considered that Agnes Binny was totally divested of the lands, the fee whereof was fully established in her son Matthew Hay, by his infeftment, the precept of *clare constat* in favour of the defender, and the infeftment following thereon, can have no manner of effect. They were perfectly inept, and null and void, in respect that the said Agnes Binny was not the person who died last vest and seised: They can, therefore, establish no sort of title in these lands to the defender. He must be considered as still possessing, in virtue of his apparency to his grandfather Matthew Hay; and, of course, he cannot be subjected in payment of his father's debt, more than if he had remained, without making any attempt whatever to establish a feudal title to them in his person.

But, even supposing this erroneous title effectual to bring the defender under the predicament of the statute, unless it can be legally taken away, yet, as the defender was only about 14 years of age when it was made up, he is entitled to be reponed against it, upon the head of minority and lesion, and to be relieved of every consequence that might otherwise attend it.

No 93.

It was, indeed, maintained, upon the part of the pursuer, That the defender's entering heir to his great-grandmother, was with a view to defraud the pursuer of his just debt; and that although, where real lesion appears, the law will lend its aid to a minor, yet it will not lend its aid to his being reponed against an act which was done with an obvious intention to defraud.

But to this the defender answers, that the pursuer's insinuation of the defender's intention to defraud him, by making up titles to Agnes Binny, is altogether ideal and imaginary; for, surely, the defender had occasion to devise a scheme of that kind, in order to relieve himself from any claim for debts.

Answered; That the substance of the defender's argument really comes to this: That, as he has been unsuccessful in his attempt to defraud the pursuer, by entering heir to Agnes Binny, and suppressing the writs since recovered, he ought to be restored against that fraud to his former state, in order to enable him to practise another species of fraud, by lying out unentered to Matthew; for the purpose of the defender serving heir to Agnes Binny, was to defraud the pursuer of his just debt, and avoid the very ground on which he is now subjected, viz. his father's having been more than three years in possession, as apparent heir. But this justice will not permit. The law will lend its aid to a minor who has suffered real lesion; but it will lend no aid to a minor, to re-pone him against his own rational and proper act, in order to put it in his power to hurt or defraud his neighbour, especially as the act against which he craves restitution was done obviously with an intention to defraud.

The title and the purpose of the act 1695 was to obviate, not to encourage, the fraud of apparent heirs; and it does by no means require or suppose, that the titles are to be strictly legal, but the contrary; and that, in the making them up, the services are expedite to persons more remote than strict law demanded, and that there is a degree of fraud in passing by predecessors. All the act requires and supposes, is, that the heir hold the possession on a service to a more remote predecessor, without considering whether the title be made up according to the strict rules of the feudal law. If the titles be made up to a more remote predecessor, that is sufficient, whether it be done from necessity or choice. In many cases, necessity requires, that, in making up titles, the interjected person be passed by; but several instances might be specified in which that is not the case.

The defender is mistaken when he maintains, that Agnes Binny was totally divested of the lands, and that his precept of *clare* and infeftment could be no advantage to him. As to lesion, there is none in the case. By making up titles to Agnes Binny, he incurs no greater burden than what would have fallen upon him had he entered heir to Matthew. It was certainly a rational, proper, and necessary act, that the defender should enter to the subjects, in order to vest the property of them in him: Now, had he entered heir to Matthew, upon what ground could he be restored, and seek restitution? The only lesion he can allege is, that, by this entry, he was prevented from defrauding his father's

creditors, by lying out unentered. The titles were made up in the manner above stated, not from mistake, but from design; and, even though they were erroneous, that could not avail the defender, unless it were in his power to instruct, that, if they had been made up in any other way, he would have got free of the pursuer's claims; but it is impossible for him to do so, and, therefore, there can be no lesion.

THE COURT "unanimously adhered to the Lord Ordinary's judgment."

Act. *M'Laurin.*

Alt. *Wight.*

Clerk, *Ross.*

Fol. Dic. v. 4. p. 43. Fac. Col. No 148. p. 4.

1796. June 10. JOHN CALLAND and his Attorney against DONALD CAMPBELL.

COLONEL CAMPBELL of Barbreck having died much in debt, Captain Donald Campbell, his eldest son, declined representing him, and brought a sale of the estate, as apparent heir.

He afterwards entered into a transaction with John Calland of London, by which the latter agreed to make over to him certain heritable and personal bonds due by Colonel Campbell, in return for some contingent securities which Captain Campbell held from the Earl of Glencairn.

The transaction was preceded by a communing for several months, and it was completed by the parties themselves in London, without the presence of any person acquainted with the law of Scotland, by missives, obliging themselves to grant regular conveyances of the securities *hinc inde*.

Captain Campbell afterwards became apprehensive, that the acquisition of Calland's debt would involve him in a passive title, in terms of the act 1695, c. 24. and refused to grant the conveyances on his part.

After this, Calland brought an action against him for implement, in which he contended, that as the transaction was fair and deliberate, its validity could not be affected by its having consequences of which the parties were not aware at the time. The defender, on the other hand, maintained, that if fulfilling the agreement was to have the effect of involving him in a passive title, the transaction would be so hurtful to him as to entitle a court of equity to set it aside, as taking its rise from a fundamental ignorance of the subject.

The Lord Ordinary reported the cause on informations.

THE LORDS, before answer, sisted precess, until it should be tried, between the defender and his father's creditors, "How far fulfilling the agreement in question would subject him in an universal title, as representing his father?"

In a petition against this interlocutor, the pursuer stated the prejudice which, owing to the contingent nature of the defender's securities, he might sustain by the delay which this interlocutor would occasion, and contended, that it was

No 94.

An heir apparent does not incur a passive title by purchasing a debt affecting the estate of his ancestor, unless he possess the estate in consequence of it.

No 94. incumbent on the defender to prove his defence, without calling additional parties.

The Court ordered a hearing in presence, upon the question stated in the interlocutor.

Captain Campbell

Pleaded; By our early law, the heir might have possessed on apperency without subjecting himself in payment of the debts of his predecessor; an evil which was removed by the introduction of the passive title of *gestio pro heredede*. Still, however, he might have got himself vested with the character of creditor to his ancestor, and in that way obstructed the interest of other creditors. For this reason, the act 1661, c. 62. was passed, making apprisings purchased by an heir-apparent redeemable at the instance of posterior apprisers upon payment of the sum which the former had actually given for them. But it being often difficult to ascertain that sum, the act 1695 was at last passed, with a view to prevent every interference of apparent heirs with the estate of their ancestors. It declares, That the heir shall incur a passive title, if he ' either enter ' to possess his predecessor's estate, or any part thereof, or shall purchase' any right affecting it. From the disjunctive words of the statute, therefore, as well as from the spirit of the enactment, it is evident that the penalty is incurred by the mere act of purchasing the right, though no possession should follow; Erskine, b. 3. tit. 8. § 85.

Answered; The statute is no doubt inaccurately expressed; but its sole object was to prevent apparent heirs from taking possession of the estate of their predecessors by a singular title. Indeed, it merely followed out the act of sederunt 28th February 1662, which supposes possession; and there would have been neither justice nor expediency in preventing heirs from purchasing the rights of creditors, provided they make no use of them as a title to possess the estate. Accordingly, since the date of the statute, the mere act of purchasing a debt has in no case been found to infer a passive title; and, with the exception of Mr Erskine, it has been the uniform opinion of lawyers, that a passive title was not incurred by so doing; 7th June 1710, Watson, No 88. p. 9743.; 20th July 1759, Macneil, No 92. p. 9752.; Bankton, v. 2. p. 354. § 101. p. 369.

Two of the Judges considered themselves obliged, by the words of the statute, to hold the mere act of purchasing a debt sufficient to infer the passive title; but the rest, upon the grounds last stated, were of the opposite opinion. The defender, (it was further observed,) by bringing the estate to sale, had acted fairly, and had constituted himself trustee for all concerned; and if, in purchasing the debts, he should obtain any benefit, he would be bound to communicate it to the other creditors.

THE LORDS found, " That the purchase of the debts in question by the defender, upon his father's estate of Barbreck, does not subject him in an univer-

sal passive title, and therefore repelled the defences: Found the defender, No 94.
bound to fulfil the agreement entered into with the pursuer, in terms libelled."

Lord Ordinary, Swinton.

Act. Lord Advocate Dundas, A. Campbell junior.

Alt. Solicitor-General Blair, Geo. Fergusson.

Clerk, Home.

D. D.

Fac. Cbl. No 221. p. 518.

S E C T. XIII.

Behaviour how purgeable?

1629. February 14. STEVEN *against* PATERSON.

INTROMISSION with heirship goods, found purged by the heir's obtaining warrant from the Lords, directed to the Bailies of Edinburgh, to make inventory of the goods in his father's house, and which inventory was accordingly made before process against him at the instance of his father's creditors.

No 95.

Fol. Dic. v. 2. p. 34. Durie. Spottiswood.

* * This case is No 19. p. 9663.

1633. February 15. JAMES BANE *against* HUGH MITCHELL.

JAMES BANE, as assignee constitute to a bond of 1200 merks granted by the Earl of Tullibardine as principal, and John Mitchell, one of his cautioners, pursued Hugh Mitchell, as son and heir to the said John, at the least behaving himself as heir, by intromission with his father's heirship goods. *Alleged*, He cannot be convened as intromitter, &c. because his father died rebel, and his escheat was disposed, and declarator obtained thereon long before the intending of this cause; and for any intromission he had, he is countable to the donatar and none other, likeas he has right from the donatar to the said particulars intromitted with by him. *Replied*, Not relevant, except it were alleged, that the gift and declarator were before the excipient's intromission; for his intromission before the same being vitious, cannot be purged by the subsequent right gotten from the donatar, which may make him bruik the same heirship goods as his proper goods, but will never free him at any of his father's creditor's hands. THE LORDS repelled the allegiance, in respect of the reply, in

No 96.

An apparent heir's intromission with the heirship moveables of his predecessor who had died at the horn, found not purged by a declarator of escheat afterwards obtained and purchased in by the heir, although before process moved against him on the passive titles.

No 96. regard that the defender was apparent heir to his father, and so his intromission being once vicious, could not be purged thereafter.

Fol. Dic. v. 2. p. 34. Spottiswood, (Heirs.) p. 142.

1674. June 10. LADY SPENCERFIELD against HAMILTON.

No 97.

It was afterwards found, that if the declarator of escheat was obtained before the heir was attacked upon his intromission, this was relevant to purge the intromission.

THE Lady Spencerfield pursues Hamilton of Kilbrackmount for payment of a debt of his predecessors, and insists against him as behaving as heir by intromission with the heirship moveables, viz. the plenishing of the house, and as lucrative successor by a disposition. The defender *alleged*, 1^{mo}, that the defunct could have no moveables, because he was rebel at the horn when he died, whereby the property of his goods were devolved to the King. 2^{do}, It was offered to be proved, that the defunct's escheat was gifted before the defender's intromission. 3^{tio}, His intromission was by warrant of the LORDS, allowing him to possess the house, so that any plenishing that was therein being yet extant, can import no passive title. It was *answered*, That it was not relevant that the defunct died rebel, or his escheat was gifted, unless it had been also declared before the intromission, for the declarator is equivalent to the confirmation of a testament, which only purges vicious intromission; and the LORDS' warrant imports no power to dispose, or make use of any of the moveables of the house.

THE LORDS found it not relevant, that the defunct was rebel, or his escheat gifted, unless it were declared before intending of the cause, or that the gift were in favours of the defender, or that he had intromitted by warrant from a donatar.

Fol. Dic. v. 2. p. 34. Stair. v. 2. p. 270.

*** Gosford reports this case :

IN a pursuit at the Lady's instance against Kilbrackmount, as vicious intromitter with the moveable heirship which belonged to his uncle, who was debtor to the Lady; it was *alleged absolutor* because it was offered to be proved, that the defender's uncle died rebel at the horn, and his escheat gifted in favours of a donatar, to whom he could only be liable, and that before any intromission had by the defender. It was *replied*, that the defence ought to be repelled, unless it were farther alleged, that the gift was declared before the defender would intromit, or that the defender himself was donatar; and if neither of these can be alleged, he ought to be liable as vicious intromitter, just as in the case where it is alleged, that there is an executor to whom the intromitters with moveables can only be liable, which is never sustained, unless the testament be confirmed. THE LORDS did repel the defence in respect of the reply, and found, that an intromitter with moveables, cannot purge his *vice*, unless he allege that he had

a gift himself before his intromission, or that he had a warrant from the donatar to whom the gift was granted; otherwise he must allege, that the donatar's gift was declared; there being a *par ratio* in alleging against vicious intromission, that there was an executor or a donatar; which cannot defend a third party which had no right from them, unless they can allege that the executor was confirmed before the intending of the cause, or the donatar's gift declared.

Gosford, MS. p. 413. No 693.

No 97.

*** This case is also reported by Dirleton :

IN the case of the Lady Spencerfield *contra* Robert Hamilton of Kilbrackmount, the LORDS found, that the allegiance, viz. That the defender could not be liable as intromitter, because there was a gift given of the defunct's escheat being rebel, is not relevant, unless the gift were either declared, or were to the defender himself, or that he had right from the donatar; for in the first case, he is in condition parallel with an intromitter, in the case of executor confirmed; and cannot be said to be intromitter with the goods of a defunct, and *bona vacantia*, the right of the same being in a living person *per aditionem*, and by confirmation; and a third person intromitting where there is no declarator, who has not the gift himself, nor a right from the donatar, is not in a better case than an executor decerned; and in the case of a donatar intromitting, or the intromission of any other having right from him, there is the pretence and colour of a right in the person of the intromitter, which is sufficient to purge vitious intromission.

They found in the same case, that a person entering to the possession of the defunct's house by warrant of the LORDS, their possession of the goods in the house doth not infer intromission, unless they make use of such goods as *usu consumuntur*, or dispose of such goods as are not of that nature, as beds, tables, and such like.

Clerk, *Hamilton.*

Dirleton, No 187. p. 75.

1676. February 10.

GRANT against GRANT.

GRANT pursuing Grant, as behaving as heir to his father, by intromission with his heirship moveables, he *alleged* absolutor, because his father died at the horn, and the defender obtained a gift of his escheat before intending of this cause, which as by the ordinary practice, would liberate him from vicious intromission, so for the like reason it must liberate him from intromission with heirship moveables. The pursuer *answered, non relevat*, unless the gift had been before the intromission; *2do*, Unless the gift had been declared before intending of this cause, It was *replied*, That albeit the gift was after the intromission,

54 H 2

No 98.

The apparent heir's intromission with the heirship moveables was found purged, he having obtained, before intending of the cause, a gift of his father's escheat, altho' not declared.

No 98.

it is sufficient to purge the preceding unwarrantable intromission, being before intending of this cause, as is ordinary in vicious intromission with other moveables; neither is there any need of declarator where the intromitter himself is donatar and apparent heir, and cannot declare against himself.

THE LORDS found the defence upon the gift granted to the intromitter himself, before intending of the cause, relevant, albeit not declared, and though posterior to the intromission.

Fol. Dic. v. 2. p. 34. Stair, v. 2. p. 413.

* * * Dirleton reports this case :

IN a pursuit upon a passive title of behaving, it was *alleged*, That before intending of the cause the defender had gotten a gift of the defunct's escheat.

THE LORDS upon debate amongst themselves, found, that albeit the gift was not declared, yet it purged the defender's vicious intromission, being before the intending of the cause, and that the defender having the goods in his hands, needed not a declarator.

This seemed hard to some of the LORDS, in respect by our custom there being two ways *adeundi hereditatem*, viz. either by a service or by intromission with the defunct goods, that were in his possession; the apparent heir, meddling with the goods, *gerit se pro herede*, and so by his intromission, having declared his intention also fully, as if he were served heir, *semel heres* cannot cease to be heir, there being *jus quasitum* to the creditors as to a passive title against him. 2do, The pretence that the defender is in the same case, as if there were an executor confirmed before the intending of the cause, is of no weight, seeing the defence upon the confirmation is sustained, because there is a person against whom the creditors may have action, which is not in the case of a donatar. 3tio, A donatar has no right without a general declarator, and though when the donatar has the goods in his hand, there needs not a special declarator, yet for declaring his right, there must be a general one. 4to, As to that pretence, that the defender cannot be liable as intromitter with the defunct's goods, because they belong to the fisk and not to him; it is *answered*, That the goods being in the possession of the defunct, the apparent heir thereafter meddling with the same *eo ipso adit*, and the creditors ought not to be put to debate, seeing he is in possession; and if a person should be served special heir to the defunct, though the defunct's right were reduced and the *hereditas* could be *inanis* as to the benefit, yet the heir would be still liable.

Dirleton, No 331. p. 158.

* * * This case is reported also by Gosford :

Grant being pursued for payment of his father's debt, upon that passive title, that he was vicious intromitter with his goods and gear, it was *alleged* absolver, because his father died at the horn, and his escheat was gifted, so that the

donatar only had right to the moveables, and they not being the defunct's goods, the defender could not be liable as vicious intromitter, which can never be sustained but where the defunct was undoubted proprietor of the goods. It was *replied*, That albeit the escheat was gifted, yet it was never declared before, which the donatar could have no right to pursue. THE LORDS did sustain the defence notwithstanding of the reply, and found, that the defunct being denounced to the horn, and his escheat gifted either to the apparent heir, or to one from whom he had right, did free him from that passive title of behaviour and vicious intromitter with the defunct's goods; but if he had intromitted before any gift, the case would have been of more difficulty.

Gosford, MS. p. 539. No. 852.

1723. November 14.

WILKIESON against ALVES.

AN apparent heir having subjected himself to the passive title of behaviour, by intromitting at his own hand with his predecessor's writs and evidents, and having thereafter within year and day entered heir *cum beneficio inventarii*, he pleaded, that the passive title of behaviour was purged by his entering heir *cum beneficio*, just as vitious intromission is purged by a posterior confirmation. *Answered*, The act 1695, gives not the benefit of inventory to those who have had any prior intromission with the defunct's estate; and therefore the heir cannot plead upon his inventory.

THE LORDS repelled the defence. See APPENDIX.

Fel. Dic. v. 2 p. 341.

DIVISION II.

Lucrative Successor *post contractum debitum*.

SECT. I.

The disposition must flow from the father.—The donee must be apparent heir in the subject.—Effect of the donee dying before his father.—Disposition in trust for behoof of the apparent heir.—What must be the nature of the subject disposed to infer the passive title?—Acceptance of the disposition sufficient.—Bonds disposed to the heir will be presumed to have been heritable, in order to infer the passive title.

PORTERFIELD *against* KER.

No 100.

IN an action pursued by William Porterfield of that Ilk, as son and heir to Mr John Porterfield of that Ilk, *contra* Daniel Ker of Casland, as son and heir to Thomas Crawford of Jordan, and Janet Ker, his spouse; the LORDS found the said Daniel Ker successor to his father, in respect he was infeft by his father *post contractum debitum* in the lands of Newmains of Inchipan. THE LORDS would not burden the pursuer to prove that his father was infeft.

Kerse, MS, fol. 141.

1619. July 25. or 26. LORD OGILVY *against* KINTAWNS.

No 101.

FOUND, That the oye receiving infeftment from the goodsire *vivo patre*, cannot be convened *tanquam universalis successor*.

Kerse, MS. fol. 142.

1619. July 30.

A. *against* B.

No 102.

THAT successor *titulo lucrativo* cannot be qualified relevantly by reservation of a reversion by the father to the son, against which no order of redemption followed, the reversion being only *ad vitam*, and with advice of friends.

Kerse, MS. fol. 142.

1625. July 13. WILLIAM GRAY *against* WILLIAM ———.

No 103.

THE LORDS found, That an universal successor *post contractum debitum* is obliged *in solidum* for the debts contracted before, and may not renounce; the LORDS dispōned to him to liberate himself.

Found the contrary, Mr David Curtie *against* John Weems, No 120. p. 9790.

Kerse, MS. fol. 142.

1628. July 8. DUNBAR *against* LESLIE.

No 104.

THE LORDS found, That a charter granted to an heir of the lands of which his father was heritor before, the said charter flowing from no deed done by the father to the son, but proceeding upon another party's resignation in favour of the son, having no dependence or relation to the father's right, made not the son to be lucrative successor to the father in these lands.

Fol. Dic. v. 2. p. 35. Durie.

*** This case is No 15. p. 5392, *voce* HEIRSHIP MOVEABLES.

1634. February 14. ORR *against* WATSON.

No 105.

By contract of marriage betwixt Peter Orr and Elizabeth Watson, John Watson, father to the said Elizabeth, is obliged to pay a sum in tocher with her to the said Peter Orr. Janet Orr, daughter of this marriage, being executrix confirmed to the said Peter, pursues the said Elizabeth, her own mother, as successor to the said John Watson, her father; *post contractum debitum*, to pay the said sum to the pursuer; for after the contract of marriage, the said John Watson, who was obliged in the tocher, having no bairns but this Elizabeth Watson, who was defender, and other two daughters who were begotten by him of a prior marriage, whereof the one compeared in this process, and renounced to be heir to her father, and the other daughter was dead, leaving some bairns behind her, who were not convened to pay, but were beggars, and had nothing by their father, the said John Watson having dispōned all his means, lands, and goods, to this daughter begotten in the second marriage; and she being convened to pay solely, as successor to her father, as said is, *post contractum debitum*; it being questioned if she could be craved to be decerned *in solidum* for the whole debt, seeing there were other two sisters who might be *co-hæredes*, and who ought to be decerned for their parts, and therefore that this defender could not be decerned as liable for the whole *in solidum*; for

One of three heirs portioners by accepting a gratuitous disposition from her father, of his whole estate exclusive of her other two sisters, was found liable *in solidum* for her father's debts without necessity of discussing the other sisters. But action of relief was reserved to her against the other two sisters who, she alleged, had got provisions from their father equivalent to the estate dispōned to the defender.

No 105. none could be convened as successor *post contractum debitum*, but such a person as might totally represent the defunct, and be heir to him; and true it is, that the defender alleged, that she could not be heir to him, but only one of three heirs, there being three daughters, as said is; therefore she could not be convened, as successor to her father, to whom she could not in law totally succeed; and albeit it was true, that she were infeft in all her father's means, and that the other two sisters had nothing by their father, yet they ought to be legally convened and discussed; after which discussing, the pursuer might use any other remedy of law, to make this defender liable *actione in rem*, for repeating of the umquhile father's goods and lands from her, upon the act of dывoury, or otherwise, as she best might, but not by this pursuit to convene her, as successor to her father *in toto*, to whom she could not succeed totally, but as one of the three;—this allegiance was repelled, for the LORDS sustained the action against her *in solidum* for the whole debt, albeit the other two sisters were not convened as heirs or successors; (and yet they were also convened as heirs and successors in the same process,) seeing the one sister compeared by her procurator, and renounced to be heir, and the other was poor, and had nothing; neither could the defender qualify, that the other two sisters had succeeded, or might have succeeded to any thing by the father's decease; and this defender was not convened *hoc nomine* as heir, but as she who had acquired all her father's lands and estate *post contractum debitum*, so that there would never be any other heir-portioner, who might be convened as heir or successor.

Act. Gibson.

Alt. Maxwell.

Clerk, Gibson.

1634. March 21.—IN this cause, whereof mention is made 15th February 1634, it being there *alleged*, That the one sister convened as successor could not alone be found liable in the whole debt acclaimed, because the other two sisters had every one of them received from the father in money, satisfaction of as much as near equivalent to the land wherein the defender was infeft, so that of reason they ought proportionally to bear their part of the burden; this allegiance was repelled, seeing the payment of the monies by the father to his daughter, in his own lifetime, was no relevant cause *in jure*, whereupon any ground of action might be moved by the creditor against them, for thereby they could not be reputed successors, as this defender, against whom, as succeeding to her father's heritage *post contractum debitum*, she had in law and practick a competent action *hoc nomine*, which was not competent against the others, and therefore the action was sustained *in solidum* against her; but the LORDS reserved to her action of relief against the other sisters upon that ground, for the satisfaction received by them from their father proportionally, as accords of the law. *Item*, It being thereafter *alleged* by the defender, that she could not be convened as successor *titulo lucrativo* to her father, because she was infeft in the lands libelled, whereto she was alleged to have succeeded *ex*

causa onerosa, for the time of the acquiring thereof she was widow, and was twice married before the same, whereby it was lawful and probable that she did so acquire the heritable right of the land from her father, for causes onerous; and thereby it appeared that she acquired not the same upon any favour flowing from her father; likeas the disposition made to her, and whereupon the infestment proceeded, bears, To be done for causes onerous, viz. for sums of money really paid, and confessed to be received from her; and it being *replied*, That the narration contained in the disposition cannot make the same to cease to be a mere-donation, except the defender will otherways lawfully instruct the real payment of the monies therefor, especially where this confession is emitted betwixt father and daughter, to the prejudice of an anterior creditor, especially seeing the same is done after the pursuer had recovered sentence against the defender, and her father also, for production and delivery of the said contract to her, by the which contract she was constituted the pursuer's debtor, wherethrough it may appear, that the disposition truly is but a donation, whatever the conception of the words, and tenor thereof otherways proports: This allegiance was found relevant, notwithstanding of the answer, which was repelled; for the disposition of the foresaid tenor was found sufficient to elide that ground, whereby the defender was convened as successor *titulo lucrativo*, seeing it bore to be done for sums of money received; and the LORDS found it not necessary to prove the payment of the sums otherways than by the writ itself, and by her own oath upon the verity thereof; and found it not necessary that she should prove it otherways; and yet nevertheless the LORDS found, that they would take the declaration of the notaries, subscribers of the disposition, and of the witnesses inserted therein (without swearing and taking their oaths thereon) anent the verity of the said payment, and what they know therein; which declaration unsworn, they would take in presence of the defender, and before that she would depone thereon, and granted letters to the pursuer to summon them for that effect. See PROOF.

Act. Nicolson & Gibson.

Alt. Stuart & Moruat.

Clerk, Gibson.

Fol. Dic. v. 2. p. 35. Durie, p. 704. and 714.

* * * Kerse reports this case.

THE LORDS found process against one of the daughters of the defunct, as successor *titulo lucrativo, in solidum*, albeit it was *alleged*, that the defunct had two daughters of the first marriage.

Kerse, MS. fol. 142.

. This case is also reported by Spottiswood.

No 105.

1634. February 15.—By contract of marriage between Peter Orr and John Watson, taking the burden for Elizabeth Watson his daughter, the said John was obliged to give Peter in tocher with his daughter 2000 merks. Peter dying, leaveth by his wife Elizabeth a daughter named Janet, who being confirmed executrix dative to her father, pursued her mother to hear and see the foresaid contract of marriage registered against her as successor to her father, after the date of the said contract. *Alleged*, The contract could not be decerned to be registered against her *hoc nomine* as successor to her father, *post contractum debitum*, because she is but only one of three daughters of the said umquhile John Watson, and so one of three heirs portioners, so that no process could be sustained against her to make her heir *in solidum*, except the pursuer did insist against the whole three, who all together represented the defunct in succession. *Replied*, No necessity to insist against the other two sisters as successors to their father, because the defender had only succeeded *hoc nomine*, and her other two sisters had no benefit at all of their father; likeas, they offered to renounce, whereby they being discussed that way by renouncing, the only succession remained with the defender, and she should be holden *in solidum*. *Duplied*, None can be convened as successor, but such a person as is *haeres aliqui successurus*, and may be heir to a defunct; but by law, where there are only heirs female, they are all alike heirs portioners to the defunct, and not one of them, but all together do represent the defunct and must be convened together, and sentence must pass against them all alike; and where it is offered that the other two sisters shall renounce; *imo*, They are not lawfully charged to enter heirs, and so cannot renounce; *2do*, Albeit they might in this pursuit be heard to renounce, yet that cannot prejudice the third sister, against whom the pursuer only insists, to compell her to represent the defunct *in solidum*, she being only one of three heirs portioners. THE LORDS repelled the exception, in respect of the reply.

Spottiswood, (SUCCESSORS and SUCCESSION.) p. 315.

. The same case is also reported by Auchinleck.

1634. March 21.—JANET ORR, executrix-dative confirmed to Peter Orr, her father, pursues Elizabeth Watson, [her mother, to hear and see a contract of marriage past betwixt her umquhile father and mother, registered against her mother as successor to John Watson her father, grandfather to the pursuer *titulo luerativo* after the said contract of marriage, for payment of the tocher promised in the said contract of marriage. It was *alleged* for the defender, That she could not be convened *hoc nomine* as successor, because she was but one of the three sisters who were, or might have been, portioners, so that al-

though her father had made a disposition to her in his own lifetime of a tene-
ment which was all the heritage he had, yet she cannot be convened for the
whole *hoc nomine*, but for the third part, and as to the third part, she bruiks by
her father's disposition as a stranger. To which it was *replied*, That the other
two sisters had got no benefit by their father's heritage, and were content to
renounce, so she bruiking the whole heritage by her father's disposition, must
be liable for the debt. THE LORDS found that the defender was liable for the
whole debt, *in solidum*, 15th February 1634. In the same action it was *ex-
cepted*, That the said Elizabeth could not be pursued as successor *titulo lucra-
tivo*, because the disposition made to her bore for sums of money. To which
it was *replied*, that howsoever the disposition bore for sums of money, yet that
general clause ought not to be respected, except the particular sums paid by
her had been expressed, seeing she was not able to qualify any sums truly to
to have been paid by her for the said disposition; and seeing the same was be-
twixt the father and daughter, and for no sums truly paid, the same could not
stand in prejudice of the creditors, conform to the act of Parliament. To which
it was *answered*, That it ought to be repelled, except the reply were proved by
writ or oath of party. THE LORDS ordained the defender to give her oath.

Auchinleck, MS. p. 4.

1636. March 23.

FORBES and FULLERTON *against* FULLERTON of Kinabar; and LIGHTON *against*
L. KINABAR.

JOHN FULLERTON of Kinabar was bound, by contract of marriage, to provide
the heirs-male, gotten between him and Janet Lindsay, his spouse, to 4000
merks. Gideon Fullerton, heir-male, assigned this contract, and all right he
had thereunto, to John Forbes of Balnagask, who pursued John Fullerton,
elder of Kinabar, and John Fullerton his son, the one son, and the other grand-
child to the said umquhile John Fullerton, party contractor, as successors *titulo
lucrativo post contractum debitum* to the said umquhile John, to fulfil the said
contract in this point. *Alleged* for John Fullerton elder, That he cannot be
decerned as successor *titulo lucrativo*, because any infeftment he has (proceed-
ing from his umquhile father) is only of liferent, the fee being provided to his
son, grandchild to the defunct, and so he having no heritable right flowing
from his umquhile father, cannot be esteemed successor to him.—THE LORDS
repelled this allegiance, and found that he might be convened as successor to
his father by virtue of that liferent infeftment and fee given to the grandchild
together in the same contract, otherwise it were a certain way to defraud all
creditors; for the defender being by this means freed, there can be no action
upon this ground against his son who was in the fee, because he could not be
thought successor to his grandfather, his father being between him and it, and
so the creditors should be disappointed altogether.

Fol. Dic. v. 2. p. 35. Spottiswood, (SUCCESSORS and SUCCESSION.) p. 316.

A son was
found to be
lucrative suc-
cessor, altho'
the father had
disponed to
him only in
liferent, and
to a grandson
in fee.

*** Durie reports this case :

No 106.

1636. *March 23.*—By contract of marriage betwixt Fullerton of Kinabar and Janet Lindsay his second spouse, the said L. Kinabar being obliged to do certain deeds in favours of the heirs to be procreated of that marriage, to which deeds the heir of that marriage having made John Forbes of Balnagask assignee, who convening the eldest son of the said L. Kinabar, procreated upon his first marriage, as successor to his said father, *post contractum debitum*, to fulfil these deeds ; and for qualifying of the same, that he was so successor, he condescended, that his said father, since the contract, whereby he was debtor to this pursuer and his cedent, had, by contract, obliged him to infest the defender, his eldest son, in liferent of his lands of Kinabar, and the said defender's son, who was his oye, in fee thereof, conform whereto they were infest ; in respect of the which liferent granted to him, who was his eldest son, and *alio-qui successurus*, he must be found liable to the debt, and to the fulfilling of the said contract of marriage : And the defender *alleging*, That this acquisition of the liferent to him from his father, could not be reputed such a right as might make him successor, seeing the succession must be in some heritable right, whereunto he might have succeeded in law, after his father's decease, which cannot be found to be in a naked liferent ; for albeit that liferent might be found liable to the debt, or might be taken away and fall, in so far as the creditor, or any other, might be thereby prejudged, yet that thereby the defender should be found liable to pay all the defunct's debts, and thereby to lay a greater burden upon him than all the heritable right of that land, and thrice as much more is worth, it were unreasonable, and ought not to be sustained, and it were a novelty not heard of before by the Lords :—THE LORDS repelled the allegiance, and found this manner of qualification of succession by this liferent-right relevant to make the defender to be universal successor, and so to be liable to the defunct's whole debts, specially seeing, in that right of liferent granted to himself, the fee is granted to his son.

Act. Nicolson.

Alt. Falconer.

Clerk, Scot.

1637. *February 23.*—Old Kinabar, the goodsir, having given a bond to one Graham in Monross, to pay certain barrels of salmon, whereto Graham having made this Lighton, pursuer, assignee, who pursuing this old Kinabar, now living, and his son as successor, *titulo lucrativo post contractum debitum* to the granter of the bond, who was father to this old Kinabar, and goodsir to his son, now defenders, for registration of the bond ; and the defenders *alleging*, That they could not be convened as successors *titulo lucrativo post contractum debitum*, in the lands and barony of Kinabar, which were the lands whereupon the pursuer had condescended that they had succeeded ; because, by a minute

of contract made before the contracting of this debt libelled, and by a decreet arbitral following on the minute, and whereupon inhibition was served against old Kinabar, and by a posterior contract, enlarged upon the said contract and minute, and for fulfilling thereof, all which (viz. minute, decreet arbitral, inhibition, and extended contract) did precede the date of this obligation libelled; in which writs the goodsir was obliged to infest his son, (now old Laird of Kinabar) in liferent, and his oye, the other defender, in fee, in the saids lands of Kinabar; in which contract there is contained a procuratory of resignation, in respect of which procuratory and writs, all preceding this bond libelled, and depending upon a preceding onerous cause of a minute of a contract of marriage, and whereupon inhibition was served, as said is, albeit the sasine, which followed after the said procuratory and writs, be after the date of the bond libelled; yet thereby, viz. by the posterior sasine, he cannot be found successor *titulo lucrativo*, the said sasine depending upon a preceding cause, necessary and onerous, and the said sasine must be drawn back *ad suam causam*, which preceded, as said is.—THE LORDS found this exception relevant to purge that member, whereby the defenders were convened as successors *titulo lucrativo*, and had no respect to that; whereby the pursuer *replied*, that the sasine was after his debt, and consequently that they were thereby successors; for nothing could elide the same but a preceding sasine before the debt, which not being taken till after the debt, as a sasine before only, would have purged this member; so the sasine after the debt must make him successor, the other rights being only personal, and the writs a year before the debt, and the sasine after the debt. And it being further *alleged*, That the constitution of a liferent by the goodsir to his own son, father to the young Laird, could not make him convenable as successor, seeing that right was transmissible by assignation, and needed no sasine, and consequently could not prove him successor; the LORDS repelled this exception, in respect, by the writs produced by the excipient's self, to instruct the foresaid other exception, the goodsir had not disposed his liferent to his son that way, in manner of assignation, but, in a body of a writ, obliged himself to infest his son in liferent, and his oye in fee, of the laids lands, and had subscribed a procuratory of resignation of that tenor, whereupon infestment followed, as said is; which writ, containing the liferent to himself, and the fee to his son, so constituted by infestment, made the father to be reputed also successor, who had contented himself with the liferent, having acquired the heritable fee to his own son, oye to the goodsir, granter of the bond, as said is; but this was elided by the foresaid other exception, admitted as said is. This cause was thereafter disputed over again, and stands yet in suspense undecided.

Act. Nicolson, Baird, et Alex. Nicolson.

Adv. Advocatus et Stuart.

Clerk, Scot.

Fol. Dic. v. 2. p. 35. Durie, p. 807, & 828.

1639. *January 29.*L.A. SMEITON *against* L. SMEITON.

No 107.

In a case similar to Forbes *against* Fullerton, No 106. p. 9771. the grandson heir, after the death of his father, the liferenter, was found lucrative successor.

THE Lady Smeiton pursues registration of a contract of marriage, made betwixt umquhile James Richardson of Smeiton her son, and Rachel Wardlaw his spouse, whereby her umquhile husband, father to the said umquhile James their son, provided the pursuer to her liferent of the lands of Smeiton, in recompence of the lands of Wallieford, which she being provided unto, renounced in favours of her said son; for registration whereof she pursues James Richardson, now of Smeiton, oye to her umquhile husband, as successor to his goodsir *post contractum debitum*. And it being *alleged*, That he could not be convened as universal successor to his goodsir, because the time of the acquiring of that right from his goodsir, his father was then living, who was then apparent heir to the defender's goodsir, and so he can never be reputed, nor convened as universal successor, his father being on life; the LORDS repelled this exception, in respect of the infestment of the lands, granted after the contract of marriage, whereby this pursuer was provided to her liferent, as said is, and was given by the goodsir to the defender his oye, with reservation of the liferent to the defender's father, so that the goodsir and the father contracting together to infest the oye in fee, and providing the father to the liferent, the LORDS found this sufficient to make the oye successor to his goodsir, albeit then the oye had his father on life, who was *in linea recta* apparent heir before the oye, which was found no impediment to exclude this pursuit; but that the same should be sustained against the oye as universal successor, otherways all just creditors might be fraudulently elided.

Act. ———.

Alt. Nicolson, younger.

Clerk, Scot.

*Fol. Dic. v. 2. p. 35. Durie, p. 870.*1662. *January 14.*NICOL HARPER *against* HOME of Plandergaist.

No 108.

One granted a disposition in trust for behoof of his apparent heir, which was afterwards conveyed to the heir. He was found liable only *in valore* on the act 1621.

NICOL HARPER pursues Colonel John Home of Plandergaist, for payment of a debt of umquhile Home of Plandergaist his brother, and condescends, that the defender hath behaved himself as heir, at least successor lucrative to his brother, in so far as his brother disposed the lands of Plandergaist to William Home of Linthil, to the behoof of the defender, then his apparent heir, whereupon the defender is now in possession. The defender *alleged, Non relevat*, to infer this passive title, unless the disposition had been to the defender himself, or that he had thereupon been infest; but a third party only being in the real right, and the defunct denuded before his death, albeit there was a personal obligation of trust in favours of the apparent heir, if that cannot make him lucrative successor, but the pursuer may reduce the same, if it was without cause onerous.

THE LORDS found the defence relevant to liberate the defender from this passive title, but would not put the pursuer to reduction, but admitted it by reply, *ad hunc effectum*, that the defender should be countable according to his intromission, and that the pursuer, as a lawful creditor, should be preferred upon his legal diligence to the said disposition. No 108.

But the question arising, whether the disposition, if in trust, was lucrative or not? and what to be lucrative imported, whether without any price, or within the half or third of the just price?

THE LORDS, before answer, ordained the disposition to be produced, and such adminicles, for instructing of the onerous cause, as the defender would make use of, reserving to themselves what the same should work.

Fol. Dic. v. 2. p. 36. Stair, v. 1. p. 80.

1662. February 28. WILLIAM HAMILTON against M'FARLANE of Kirkton.

WILLIAM HAMILTON pursues James M'Farlane of Kirkton, as successor *titulo lucrativo* to his father, to pay his debt, who *alleged* absolvitor, because he was not *alioqui successurus*, in respect that, at the time of the disposition, he had, and hath, an elder brother, who went out of the country, and must be presumed on life, unless the pursuer will offer to prove that he was dead before this disposition; so that, at the time thereof, the defender was not apparent heir *et alioqui successurus*, because *vita præsumitur*. The pursuer answered, The defence was not relevant, unless the defender would be positive, that the time of the disposition his elder brother was on life; especially seeing he had been out of the country twenty years, and was commonly holden and reputed to be dead.

THE LORDS sustained the defence, that the elder brother was on life the time of the disposition, and reserved to their own consideration the probation; in which, if the defender proved simply that his brother was actually living the time of the disposition, there would remain no question; and, if he proved that he was living about that time, they would consider, whether, in this case, the presumption of his being yet living should be probative.

Fol. Dic. v. 2. p. 35. Stair, v. 1. p. 110.

1665. November. SCOT against BOSWELL.

LAWRENCE SCOT merchant, pursues David Boswell, brother's son to the deceased David Boswell of Affleck, as successor *titulo lucrativo* to his uncle for payment of a debt. It was *alleged*, Absolvitor, because brother's son is not *nomen juris* to make him represent his uncle, not being *alioqui successurus*; seeing his uncle might have had heirs-male of his own body to succeed to his

No 109.

A disposition to a younger son makes him not lucrative successor, because he is not *alioqui successurus*.

No 110.

A disposition from one brother to another, makes not the donee lucrative successor, seeing the donor has *heredes propinquiores in spe*.

No 110.

tailzied estate, and that the defender's father was next to him, failing of children; so that, in effect, by the disposition, he was but as a stranger, not being apparent heir, nor otherwise to succeed, if the disposition had not been made. It was *answered*, That the estate being tailzied, and provided to the defender, who was eldest son of the brother, the only then next apparent heir of tailzie; it was equivalent and alike as if it had been disposed to the brother himself; and it was found in a case of the Lady Smeiton against her son this Laird of Smeiton, No 107. p. 9774, "That a disposition of the estate made to him by his grand-father (his father who was *successurus* for the time being on life,) made nevertheless the oye liable as successor." *Replied*, That the case adduced was *in linea recta*, where none should succeed but the son or oye, which is not in this case, for Affleck might have had sons of his own body; so that neither brother nor brother's son could be said to be *alioqui successuri*.

THE LORDS found the brother's son not to be convenable as successor, in respect the disponent might have had succession of his own body; but prejudice to the pursuer to impugn the disposition as being made to a conjunct person in prejudice of creditors.

Fol. Dic. v. 2. p. 35. Gilmour, No 168. p. 119.

* * * Newbyth reports this case:

DAVID SCOT being a creditor to David Boswell of Auchinleck, after his decease pursues the three daughters of the first marriage for the sum of L. 1000 Scots and annualrents thereof, and their husbands for their interest, as representing their father David Boswell. The three daughters offering to renounce, it was *alleged* for the pursuer, They cannot renounce, because they behaved themselves as heirs to their umquhile father, in so far as, by their mother's contract of marriage with their father, it is provided, That in case there be no heirs-male procreate of that marriage, but only female, that then and in that case, the heirs-female should have no right to the said lands and barony of Auchinleck, nor to other lands which should happen to pertain to him the time of his decease, *et ita est*, they have renounced the estate in favours of the apparent heir-male or his son, and have received good deed therefor; and craved that they and the apparent heir may exhibit the contract of marriage, being in their own hands; and thereby the estate is fraudulently conveyed in prejudice of lawful creditors. In this pursuit, David Boswell, now of Auchinleck, who was apparent heir to James Boswell, brother to umquhile David Boswell, is likewise convened in this process. THE LORDS found that heirs-female renouncing their right to tailzied lands in favours of the apparent heir-male or his son, albeit they got good deed therefor, could not be pursued for their father's debt; and also, that a disposition of land made to the son of the apparent heir, the

apparent heir being alive, could not, be such a title against the person, receiver of the disposition, as to make him liable *passive* for payment of the debt.

No 110.

Newbyth, MS. p. 40.

*** Stair's report of this case is No 19. p. 3571, *voce* DISCUSSION.

1665. December 2.

EDWARD EDGAR *against* COLVIL.

No 111.

Lucrative succession inferred by an assignation of an heritable bond by a father to his eldest son who would have succeeded him as heir therein.

EDWARD EDGAR pursues ——— Colvil, successor lucrative to his father, Mr Alexander Colvil, in so far as he accepted an assignation of an heritable bond, unto which bond he would have succeeded as heir. It was *answered*, That this passive title was never extended to bonds of provision granted by a father to his eldest son; and if in security and satisfaction of such a bond of provision, an assignation of a debt due to the father and his heirs were granted, it could not infer an universal title to make the acceptor liable to his predecessor's whole debt, so neither can an assignation to a bond, which is no more in effect, and such odious passive titles are not to be extended, but the pursuer may reduce upon the act of Parliament 1621, or at the farthest, may crave by this process the simple avail of what the defender hath intromitted with by virtue of the assignation.

THE LORDS found the condescendence relevant, as being *præceptio hæreditatis*; and as an assignation to a tack or a small annualrent, hath been found sufficient, so there is like or more reason for assignations to heritable bonds, which may be more easily conveyed away from creditors; but they found it not alike as to bonds of provision whereby the father became debtor, and in satisfaction and security whereof he might assign, and would only import single payment, but not an universal passive title.

Fol. Dic. v. 2. p. 36. Stair, v. 1. p. 319.

*** Newbyth reports this case :

EDWARD EDGAR being a creditor to umquhile Mr Alexander Colvil of Blair in the sum of 3000 merks, pursues the relict as vitious intromissatrix with the defunct's goods and gear, and his bairns upon the passive titles *alternative* libelled, and insisted upon that passive title against the apparent heir as successor *titulo lucrativo post contractum debitum* by his acceptance of rights, not only of lands, but of heritable bonds and sums of money thereby due, which ought to infer that passive title against him who is *alioqui successurus*. THE LORDS found a disposition or assignation to be an heritable debt granted by the father to the son, sufficient to make the son liable as successor *titulo lucrativo post con-*

No 111. *tractum debitum*. and so to make him liable for all his father's debts; notwithstanding it was *alleged*, That the said passive title can only be inferred from the acceptance of such rights whereupon infeftment had followed, but not for any other rights whereupon there was no infeftment.

Newbyth, MS. p. 42.

1666. July 3. EARL of KINGHORN against LAIRD of UDNEY.

No 112.

A party granted a wadset. The wadsetter by missive acknowledged the sums to be satisfied, and obliged him to renounce. His heir was pursued to grant the renunciation, as representing on the passive titles. Another mode of accomplishing the object suggested by the Court.

THE umquhile Earl of Kinghorn having granted a wadset to the umquhile Laird of Udney, he, by his missive, acknowledged the sums to be satisfied, and obliged him to grant a renunciation; whereupon the Earl of Kinghorn pursues this Udney, as representing his father, to grant renunciation, and procuratory of resignation; and condescended upon the passive title thus, that umquhile Udney, after the receipt of the sums contained in the wadset, had infeft the defender in the estate of Udney, reserving to himself a power to alienate and dispone; after which infeftment this missive is subscribed, acknowledging the receipt of the sums of before, and thereupon *alleged*, 1st, That the father was obliged by the contract of wadset, upon payment of the sums, to renounce and resign, in prejudice of which obligations he had disposed his estate to the defender, who was *alioqui successurus*, and so as lucrative successor is obliged to grant the resignation; 2^{dly}, The letter obliging the father to grant resignation, albeit it be after the infeftment, yet seeing there is a power reserved to the father to dispone his obligation, must oblige the son. It was *answered*, That there was nothing before the defender's infeftment to instruct payment, the letter being after, and no obligation therein could burden him thereafter, unless his father had disposed, or had given a security out of the estate, conform to the reservation.

THE LORDS found this passive title new and extraordinary, therefore moved to the pursuer to alter this libel, and libel therein a declarator of redemption; and to conclude the same either with a reduction or declarator, for declaring that the wadset right being acknowledged by the wadsetter to be satisfied, might be declared extinct; in which case there needed no resignation; or, otherwise, might conclude the defender to grant resignation; and the defender thereupon renouncing to be heir, the pursuer might adjudge, and thereupon be infeft; but others thought, that hardly could a right be adjudged which was satisfied and extinct.—THE LORDS referred to the pursuer's choice which of the ways he thought fit.

Stair, v. 1. p. 387.

1672. December 17.

The Lady SPENCERFIELD against The Laird of KILBRACHMONT.

No 113.

Found in conformity with
Scot against
Boswell, No
110. p. 9776.

THE Lady Spencerfield pursues the Laird of Kilbrachmont as lucrative successor to his father's brother, for payment of a debt of the defunct's, as representing him, in so far as he accepted a disposition of the lands, in which he was then apparent heir, without an equivalent onerous cause. The defender *alleged*, That the libel and condescendence were not relevant, because lucrative successor is never sustained as a general passive title, by accepting a disposition, unless it be granted to that person who is *alioqui successurus* by the necessary course of law, as being granted to the eldest son by the eldest son; but it was never sustained upon any disposition granted by a brother to a brother, or to a brother's son or other collateral; for, though dispositions to such may be reducible, as without a cause onerous, they cannot make the acceptor liable for all the disponent's debt, seeing there are still nearer successors *in spe*, viz. the defunct's children; and it cannot be supposed that the ground of this passive title for preventing of dispositions to children in prejudice of creditors can take place where the disposition is to a brother or nephew, the presumption there being nothing so strong that the defunct would exclude his own children. It was *answered*, That the defender was apparent heir for the time, and that the disponent was a very old man without hope of succession. ✓

THE LORDS refused to sustain the summons upon the general passive title, but found the pursuer might, in this action, insist upon the act of Parliament 1621 against the defender, and in so far as he had benefit by disposition make him liable.

Fol. Dic. v. 2. p. 35. Stair, v. 2. p. 136.

* * * Gosford reports this case :

KILBRACHMONT being pursued as representing his brother upon the passive titles, that he was successor *titulo lucrativo post contractum debitum*, it was *alleged* for the defender, That he being only apparent heir to his brother by the collateral line, any right made by his brother to him, can only be reduced upon the act of Parliament as done *in fraudem creditorum*, but cannot be a passive title to make him liable to his brother's whole debt far exceeding the worth of the lands, seeing that is only sustained against the apparent heirs *in linea recta* where the father disposes the estate to his son or grand-child who of necessity must be heir if he die before them; whereas, a brother disposing to another brother, he may have children of his own, and so he is not necessarily to be his heir in case he survive him. It was *replied*, The defender the time of the disposition being only his apparent heir, it is sufficient to make him liable *passive* for his brother's whole debt. THE LORDS did sustain the defence and

- No 113. found that dispositions made to a brother or one of the collateral line, could not infer a passive title, but they were only liable *in quantum lucrati sunt*, and their rights may be reduced upon the act of Parliament as done *in fraudem*.
Gosford, MS. No 545. p. 291.

* * A similar decision was pronounced, 22d December 1674, Heirs Portioners of Seaton against Seaton, No 21. p. 5397, *voce* HEIRSHIP MOVEABLES.

- No 114. 1676. July 8. JOHNSTON against ROME.

IN a pursuit upon the passive title of *successor titulo lucrativo*, in so far as the defender had a disposition from his father, without an onerous cause, the LORDS sustained the pursuit, albeit it was *alleged* by the defender, he had made no use of the said disposition, and was content to renounce the same ; which the LORDS found he could not do, being delivered to him. A concluded cause advised.

Clerk, Mr Thomas Hay.

Fol. Dic. v. 2. p. 38. Dirleton, No 377. p. 184.

- No 115. 1679. February 7. HAMILTON of Pardowie against Mr ANDREW HAY.

THE LORDS found the son not liable for the father's debt, contracted after the son's fee by the contract of marriage, but found him liable *in quantum lucratus*.

Fol. Dic. v. 2. p. 36. Fountainball, MS.

* * Stair reports this case :

Bonds dis-
posed to the
heir presum-
ed heritable,
in order to
infer the pas-
sive title.

JOHN HAMILTON of Bardowie pursues Mr Andrew Hay for relief of a sum, whereunto his father was conjunct cautioner with Bardowie's predecessor, and also for another sum due by his father to the pursuer, upon these passive titles, viz. That by his contract of marriage his father had contracted to him for several sums, and that after the cautionry foresaid, and after the other bond, the defender had bought a considerable bargain of land, which must be presumed to have been purchased by his father's means and money, especially seeing his father shortly before sold lands for 37,000 merks, and the defender was a person having no visible way to acquire so much land as he bought, by his own means; and therefore he must be liable for these debts, at least the lands acquired by the defender must be affected therewith, and he must be liable for the provisions in his contract *in quantum lucratus est*. The defender *alleged*, That neither of these grounds are relevant, for any lands he has acquired was after he was married, and had both gotten a provision from his father, and a tocher with his wife; and though the Lords have sustained the presumption, that lands ac-

quired in name of children unforisfamiliarated, are purchased by the father's means, and liable to his debt, unless the contrary were instructed, yet there is no ground to extend that to a person married, and forisfamiliarated, who not only had means, but might have contracted debts for the lands acquired.—THE LORDS found the defender's land not liable upon this presumption, but that it might be proved by his oath or writ, that these lands were acquired by his father's means, after contracting of these debts.—And as to the second ground the defender *alleged*, That suitable portions by parents to children were never found quarrelable by reduction, at the instance of prior creditors, if the father then had a sufficient visible estate to pay his debt, attour the portions, as was found in the case of the Children of Mouswell, No 60. p. 934. much less can the children be liable personally.—The pursuer *answered*, That whatever might be alleged as to tochers of daughters, or the provisions of younger sons, yet provisions to the eldest son and apparent heir, being in effect *præceptio hæreditatis*, it must make him liable *in quantum lucratus*.—It was *replied* for the defender, That the provision might be out of the father's moveables, for unless it were proved to be out of his heritable rights it could not import.

THE LORDS found, That the apparent heir being provided to sums by his father, was liable for his father's anterior debts *in quantum lucratus*; and would not put the creditors to prove, that the same was made out of heritable sums, unless the contract of marriage did expressly bear assignations to moveable sums.

Stair, v. 2. p. 688.

No 115.

1681. February 22.

MORE against FERGUSON.

GRISSEL MORE, as executrix confirmed to John Chalmers her husband, pursues Ferguson as successor *titulo lucrativo* to his father the debtor.—The defender *alleged* no process, because he hath an elder brother who is heir of line, and is not discust; *2do*, Though he were discust, the defender is not liable by any disposition made by his father, and albeit the disposition may be reduced, yet he is not personally liable.—The pursuer *answered* to the first, That the eldest son being weak, is past by, and all is disposed to this defender, who thereby is universal successor, and nothing can be shown of the father's succession, to which the eldest son could succeed.—The defender *replied*, That our law hath no such passive title as universal successor by disposition, though it were of the disponent's whole estate and means, but the passive title is successor lucrative by disposition in that right in which the party would have succeeded; so that the disposition is *præceptio hæreditatis*, which is equivalent, he being entered heir *passive*, whether the disposition be of all or of a part of that wherein he would have succeeded; and therefore *præceptio hæreditatis* is a relevant passive title against the heir of line, and if he be discust, against the heir-male, and these being discust, against the heir of tailzie or provision, such as the defender, who

No 116.

A younger son was found lucrative successor, accepting and using a disposition of his father's lands, wherein he would have succeeded as heir of a marriage.

No 116. is heir of a marriage.—It was *duplied*, That *præceptio bareiditatis* cannot be extended to the heir of a marriage, who is in some sort a creditor by the contract of marriage, and therefore at most can be liable *in quantum est lucratus*.—It was *triplied*, That though the heir of the marriage be a creditor as to the heir of line, yet not as to his father's creditors, but as to them, he represents his father as debtor, if he immix himself in his father's heritage, by accepting dispositions of his land or annualrents; though assignations to bonds taken to the heirs of the marriage being liquid might only import *quoad valorem* as to any heir, yet accepting and using a disposition as to lands and annualrents, that is an universal passive title.

THE LORDS found it a relevant passive title, that the defender had accepted and used a disposition of his father's lands and annualrents, wherein he would have succeeded as heir of the marriage; and repelled the exception of the order of discussing, seeing the eldest son was neither entered heir nor had any thing to enter heir to.

Fol. Dic. v. 2. p. 35. Stair, v. 2. p. 863.

No 117.

Found in conformity with
More against
Ferguson,
supra.

1698. November 16. ELLIOT of Swineside against ELLIOT of Meikledale.

SIMEON ELLIOT of Swineside, as assignee to the sum of 2000 merks, being the remainder of a tocher of 8000 merks, contracted by the deceased Adam Elliot of Meikledale with his daughter, pursues William Elliot, now of Meikledale, as representing his father upon the passive titles.

For proving the defender's representation, the pursuer produced a charter of the lands of Meikledale, in favours of the defender's father in liferent, and his eldest son of a second marriage to whom the defender is heir in fee, with a faculty to the father to burden the lands, not exceeding the third part of the value; and insisted to make the defender liable as successor to his father by the foresaid disposition after contracting of the pursuer's debt.

The defender *alleged*, That his father having a sufficient estate beside the lands of Meikledale, he might lawfully provide the fee thereof to a younger son, who was not *alioqui successurus*, without subjecting that son to any debt; and, for instructing that the father had a sufficient estate, repeated the inventory of the confirmed testament lying in process.

The pursuer *answered*, That the defender being executor confirmed, and having repudiated and reduced the testament, he cannot found upon it to prove a separate estate; "which answer the LORDS sustained."

The defender further *alleged*, That, albeit the testament was not probative, yet the defence of a separate right being relevant, he offered to prove his allegiance by the pursuer's oath of knowledge.

The pursuer *answered*, That the allegiance of a separate estate existing, that might now be affected for payment of the pursuer's debt, was relevant; but

esto there had been a moveable estate, which is not now extant, at least appears not, no such separate estate is sufficient to exclude a lawful creditor, in competition with a son who got the fee of a considerable land estate after the pursuer's debt; because moveables pass *de manu in manum*, without writ, and possession gives a right, and in time the very species thereof is consumed; and therefore, albeit there be an order of discussing heirs, yet no creditor is bound to discuss executors.

The defender *replied*, He is no ways to be considered as an heir, but only as a conjunct and confident person, receiving a gratification after contracting of the pursuer's debt; and it is sufficient to purge the presumptive fraud in the father, and to elide the act of Parliament 1621, that there was any sufficient estate at the time that the fee was taken to the defender, and that the debtor continued to have a sufficient separate estate to pay all his debts to his death. And, for further clearing of this point, the defender doth cite very many decisions, 21st June 1677, Hopepringle against Hopepringle, No 12. p. 4102, where a father having granted a bond after he had disposed his estate to his son, reserving a faculty, "THE LORDS found it was the presumed will of the father, that the bond should burden his executry in the first place." June 22d 1680, Grant against Grant, No 8 p. 100, where a bond to a child being quarrelled by a creditor, "the LORDS sustained the defence, that the father had a sufficient separate estate at the time." The like 11th December 1679, Creditors of Mousewell against Children of Mousewell, No 60. p. 934; 30th June 1675, Clerk against Stewart, No 46. p. 917; 6th March 1632, Laird of Garthland against Sir James Ker, No 45. p. 915; and in a case quadrating in every circumstance, 10th November 1680, M'Kell against Jamieson and Wilson, No 47. p. 920, "the LORDS found, That a disposition of a tenement made to a grandchild by a daughter was not quarrellable by an anterior creditor," seeing the disponent had a sufficient estate, whether by infestments, moveables, or bonds, notwithstanding that the disponent had no sons, and that his daughters were his appassent heirs, and that he reserved his life-rent, and a faculty to burden, as in this case.

It was *duplicated* for the pursuer, That he doth not insist upon the act of Parliament 1621, for reducing the fee in favours of the son as fraudulent, but he insists against the defender as heir to his brother, who is heir of tailzie to his father the debtor, by taking the fee in favours of a son after contracting of the pursuer's debt. And as to the practiques adduced, they are not parallel; for they are generally in the case of particular rights, or provisions to younger children, whereby the children were made creditors to their father, which the LORDS did sustain, as being rational provisions, made by parents having estate to pay their debts, and without fraud.

The only decision founded on, that doth approach to the case in hand, is that of Mr M'Kell against Jamieson and Wilson, 10th November 1680, where

No 117. the grandchild might have been pleaded to be an heir of tailzie *per praeceptionem*, and so liable to the debt; but the case was not so pleaded, nor under the LORDS' consideration when determined.

In this case, the pleading did ~~not~~ so clearly distinguish the title whereupon the defender might be overtaken, whether upon the act of Parliament 1621, or as an heir of tailzie; but the LORDS did difference the case in the reasoning, "and found the defender liable as heir of tailzie *per praeceptionem*, by progress, to his father, who purchased the said lands by his means, after contracting of the pursuer's debt, and also reserved a faculty to burden the fee."

The defender having reclaimed, representing that the original fee, in favours of the son of the second marriage, was anterior to the pursuer's debt; but that the father and son resigned, and took a new charter, with a faculty to burden, posterior to the pursuer's debt;

Upon which the LORDS, by interlocutor of the 29th November 1698, "found the defender was not liable as an heir of tailzie, the original fee being taken to the son before the pursuer's debt, albeit it was but three days prior, and the disposition retained by the father till the new resignation; but allowed a further hearing how far the defender was liable by virtue of the reserved faculty. *Vide* 16th December 1698, *inter eosdem*, No 22. p. 4130, *voce* FACULTY.

Fol. Dic. v. 2. p. 35. Dalrymple, No 3. p. 4.

1717. January 24.

Mr JOHN HENDERSON against JANET WILSON and COLONEL LAWSON,
her Husband.

No 118.

A son obtaining a disposition from his father was thereon infeft, and in possession. He dying before his father, could not be liable *praeceptione hereditatis*, but his heir was found liable, serving to him in that special subject, and possessing after the father's decease.

Mr JOHN HENDERSON pursues Janet Wilson, as representing her father, on this ground, that the defender's father disposed his estate to Francis Wilson, his eldest son, who thereupon was infeft, and in possession *praeceptione hereditatis*, and the defender, the Colonel's Lady, is heir to, or otherwise represents her said brother, and thereby is liable to the pursuer's debt, which is anterior to the father's disposition in favours of the eldest son.

The defender *alleged*, That her brother could not be liable *per praeceptionem*, because he died before his father; and, though he had accepted the disposition, and been in possession during his father's life, he might have abstained after his father's decease, and thereby would not be liable personally; and as little can the defender be liable as representing him.

It was *answered*, The defender is liable, albeit the brother was not; because she was heir served and retoured to her brother in the estate which her father disposed to him, at the least that she continued to possess the said estate after the death of her father; and, as her brother would have been liable, if he had continued his possession after the decease of her father, so the defender having

represented him by intromission with the mails and duties of these lands where-in he died, and in possession, and continued to intromit after the father's decease, she is liable, as her brother would have been liable, even though she were not specially served heir, as the pursuer offers to prove she is. And whatever might be alleged in the defender's favours, if she did represent her brother only as executor, or if she had represented him any other estate, or by another passive title; yet her intromission with the rents of, and her special service and infestment in the estate disposed to her brother, subject her to the passive titles of *præceptio*.

"THE LORDS found it relevant to make the defender liable *per præceptionem*, that she was infest as served heir in special to her brother in the lands disposed to him by her father; but found her intromission with the rents of the said lands, after her father's decease, if she was not infest therein, only relevant to make her liable *in valorem* of her intromission, because she might be *in bona fide* to continue her brother's possession, without inquiring into his title, being willing to represent him; yet that still she was liable *ip valorem* of the subject of her intromissions with her father's estate; but found no other representation of her brother relevant to make her liable for any thing."

Fol. Dic. v. 2. p. 36. Dalrymple, No. 165. p. 230.

* * Bruce reports this case.

WILLIAM WILSON of Holmshaw having contracted a debt from the said Mr John Henderson, thereafter disposes his estate to Francis his son: The son dies before the father; and, after the decease of both, Mr John Henderson insists against Janet Wilson, sister to the said Francis, as representing him on some one or other of the passive titles; and founds himself on these grounds, viz.

1^{mo}, That the said Francis Wilson having accepted a disposition from his father of his lands, he became thereby liable for all debts due by his father preceding the date thereof, as fully as if he had been served heir to him.

2^{do}, That the disposition granted by the father, and accepted by the son, was a right that descended to the son's heirs and successors.

3^{tio}, That the son's heirs representing him on any of the passive titles, makes them liable for the son's debts; and therefore, in the present case, though the sister be not served heir to her brother in special, yet, if she have behaved, &c. she must be liable for her brother's whole debts; nor can an unwarrantable intromission be restricted *ad valorem*, seeing in law they are the same persons with him, and so should be as far liable as he was; nay, there is more reason to say so here than in the case of actual entry; for, when a person enters heir in special, here there appears no design of fraud to conceal their title from the creditors; but, in case of behaviour, there seems to be a latency and work of

No 118. darkness there to enjoy the profits, and, as much as can be, conceal the same from creditors.

Answered for the defender, *imo*, That the passive titles, in so far as they are penal, do not affect the heir, who is only liable *in valorem*, when the passive title is not established in the predecessor's lifetime, which is founded upon the nature of all penal actions, which are extinguished by the death of the delinquent.

2do, Francis himself, if he had been pursued when his father and he were alive together, could not have been liable in more than the value of the subject disposed; for the acquiring a right by an heir before the death of his predecessor, is not a passive title to make the apparent heir liable in his predecessor's lifetime universally, though a creditor be founded in the act of Parliament 1621 to reduce it; but the vitiosity and passive title are founded on this, that an apparent heir pretends to bruik his predecessor's estate after his death, by virtue of a disposition made by the predecessor to him; for our law has not prohibited all commerce betwixt fathers and their children, nor made it penal, only when such dispositions after a father's death are made use of by the son, or any other heir than the law has insroduced; but, since Francis predeceased, the passive title of successor *titulo lucrativo*, &c. could not be applied to this case; nor could his heir or successor, who found that he was vested in the right of the said lands, be further liable than for the value.

"THE LORDS found the defender being served heir in special to her brother, in the subject disposed to him by her father, relevant to make her liable for the debts of the father contracted before the disposition, &c. *praeceptione hereditatis* of the father; but found, that no other representation of her brother could be relevant to make her liable, excepting intromission with the rents of the lands disposed; and that such intromission could make her liable only *in valorem*, she not being specially served." This interlocutor was reclaimed against, and adhered to. See PERSONAL and TRANSMISSIBLE.

Act. *Ille*.

Alt. *Binning*.

Clerk, *M'Kenzie*.

Bruce, v. 2. No 50. p. 68.

No 119.

In an action on the passive titles, it was insisted for the pursuer, that the defender was universally liable upon the passive title of heir served of

1745: June 6.

MERCER against SCOTLAND.

It is an established point, that clauses burdening with debts, when in dispositions to particular subjects, are understood as intended by the granter only for the security of creditors, and not to subject the disponee *ultra valorem*; but whether such clauses in dispositions *omnium bonorum* did not admit a different consideration was the question in this case.

Adam Mercer, writer in Edinburgh, by his disposition in 1732, "assigned and disposed to Mary Graham, his spouse, in liferent, and to the children pro-

created or to be procreated between them, whom failing, to his children of any other marriage in fee, whom failing, to Elizabeth Mercer his sister (passing by James Mercer his brother and heir at law) and the lawful issue of her body, whom failing, &c. all and sundry debts owing to him, heritable or moveable, and all and sundry goods, gear, and every other thing whatsoever that should pertain to him at his death, with this provision and declaration, that the right, and every person who should claim thereby, should be burdened with the payment of all his just and lawful debts, and reserving a power to alter at any time in his life."

Adam Mercer having died in the year 1740 without issue, Andrew Scotland, the only child of Elizabeth, who had predeceased her brother Adam, confirmed himself executor-creditor by the foresaid disposition; and there being a debt due to Adam, secured by infestment, Andrew Scotland obtained a decree against James Mercer his brother and heir at law, to make up titles and denude thereof in his favour, as having right thereto by the disposition, and thereon led an adjudication; he likewise served himself heir of provision in general to Adam Mercer his uncle, in virtue of the said disposition.

In a process at the instance of Laurence Mercer, son to Sir Laurence Mercer of Aldie, for a debt due to him by Adam the defunct against Scotland upon the passive titles, two questions occurred, 1^{mo}, Whether the defender was liable universally as heir served, or only *provisione tenus*; as to which *vide* of this date *inter eosdem, infra*; 2^{do}, Whether or not he was universally liable upon the clause burdening him with the payment of the disponent's debts.

It was for the pursuer *alleged*, That although such burdens in dispositions to particular subjects were never otherways understood than as only intended for the security of creditors, yet universal conveyances of a man's whole estate, heritable and moveable, were truly destinations of succession, the acceptance whereof has been always held to infer an universal passive title, even though not containing burdening clauses, and much more so when there was such a burdening clause as was in this case; that were it otherways where the *universitas bonorum* is disposed, it would be impossible for creditors to ascertain the value.

Notwithstanding this, as the defender was not *alioqui successurus*, the LORDS "found him not universally liable, but only to the value of the subjects disposed."

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provision in general, *virtute dispositionis* from his uncle of his whole estate, heritable and moveable, that should pertain to him at his death. Alleged for the defender, that his service had proceeded from mistake, and was inept, as there was nothing in the defunct, by virtue of that disposition, to be carried by a service; and that the only proper method to denude the defunct of the fee, was by an action against his heir to denude; at least, as the service was only as heir of provision, it could at most subject the defender *provisione tenus*. The Lords found the defender not universally liable, but only to the value of the subjects disposed.

1745. June 6.—IN the case stated of this date *inter eosdem, supra*, it being insisted on for Laurence Mercer the pursuer, That Andrew Scotland the defender was universally liable upon the passive title of heir served of provision in general, *virtute dispositionis* from Adam Mercer his uncle of his whole estate, heritable and moveable, that should pertain to him at his death; it was *alleged* for the defender, That his service had proceeded from mistake, and was truly

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erroneous and inept, as there was nothing in Adam the defunct by virtue of that disposition, to be carried by a service; and that the only proper method to denude Adam the defunct of the fee, was by an action against his heir to denude; at least, *2do*, As the service was only as heir of provision, it could at most subject the defender *provisione tenus*.

Answered for the pursuer, That the service was no less regular, than if Adam Mercer had first instituted himself, which was said, wherever it was done, to be an unmeaning thing, as he could take nothing by it that was not already in him; for that in the one case as well as in the other, a disposition to an *universitas bonorum* was always considered as a destination of succession. The cases of Dundonald, No 3. p. 1274, and Annandale, (*see APPENDIX*), were mentioned as instances, where titles had been made up by service in like cases with the present; and it was said, that although the service, as heir of provision in a particular subject, did only subject the heir *in valorem*, yet as such dispositions *omnium bonorum* are considered as destinations of succession, it is a consequence that the service subjects universally.

Replied for the defender, That though it may be true that instances may have been of such services, as where there is no hazard by the representation, lawyers are ready to advise every method they can think of, *valeat quantum*, which may have been the case of the instances mentioned; yet it was said, there was no instance of any judgment upon the question, Whether a service to a person in virtue of a disposition which gave nothing to the disponent, was a proper title? and much less of any judgment subjecting the person so served to an universal passive title.

THE LORDS, without distinguishing the two points, "Found the defender not universally liable, but only to the value of the subjects disposed."

Fol. Dic. v. 4. p. 44. Kilkerran, (CLAUSE.) No 4. p. 121; and No 6. p. 370, (PASSIVE TITLE.)

* * D. Falconer reports this case.

1745. *June 5.*—ADAM MERCER, writer in Edinburgh, made a general disposition of all he should have at his death to his wife, if she should survive him, in liferent, and to the children of the marriage, in fee; which failing, to his children of any other marriage; which failing, to Elisabeth Mercer, his sister-german, and to the lawful issue of her body; 'With this special provision and declaration, that that right, and all and every person or persons who should claim any benefit thereby, either of liferent or of fee, should be burdened with the payment, and the hail debts and sums of money that should be due, addebted, and resting to him at the time of his decease, and every thing else that should then pertain and belong to him, should be burdened with the payment of all his just and lawful debts.'

Andrew Scotland, at Powmiln of Aldie, Mr Mercer's nephew. by his sister, was confirmed executor on this disposition, and also pursued James Mercer, the defunct's brother and heir at law, to make up titles, and denude of an heritable debt, and thereupon led an adjudication; but, before extracting the decreet, he served himself heir of provision; and the retour bears, 'That he was *heres provisionis secundum dispositionem totorum et singulorum debitorum, pecuniæ summarum, aliorumque bonorum,*' &c.

Laurence Mercer of Aldie pursued Mr Scotland, as representing his uncle, in which process this question occurred, Whether he was liable universally, or to the value of what he had got by the succession?

Pleaded for Aldie, The defender, abstracting from his service, is liable universally, as having accepted a general disposition, with the burden of debts.

Pleaded for Mr Scotland, He is a singular successor; and universal successors only are universally liable; heirs are *fictione juris eadem persona*; but this does not apply to disponees, whom it would be hard to subject to an universal representation, as the law has not given them the benefit of entering by way of inventory. By the Roman law, a legatar is not liable *in solidum*; and there is no difference in this respect betwixt a particular legacy and a *legatum omnium bonorum*. In the present case, there are several donations to different persons, and a liferent constituted to his wife, all which are bequeathed, subject to his debts, which could not be universally. And, *lastly*, This case of a disposition *omnium bonorum* was decided 8th December 1675, Thomsons against the Creditors of Alice Thin, No 141. p. 5939.

Replied for Aldie, Whatever might be the case of a simple disposition *omnium bonorum*, yet it can never be disputed, that one, with the express burden of debts, must make the acceptor universally liable; this is the most favourable of all passive titles, founded on the consent of parties, while the others are either fictions of law, or penalties introduced in favour of creditors. If an executor were named with this provision, he would be liable *in solidum*, nor could an heir, instituted on these conditions, make use of the benefit of inventory; and the defender, who is confirmed executor, is not to be considered as a legatar, but as an universal successor; and yet it is apprehended, that, even the accepting a legacy under this burden would make him liable.

The case of Alice Thin is involved in many circumstances; and all that was found was, that the acceptor of a disposition, with the burden of debts, was not liable universally; but here, by the clause, the person of the acceptor is bound.

Pleaded further for Aldie, The defender is served heir of provision; and, consequently, represents the defunct.

Answered, The service was quite improper and erroneous, and can be of no effect, as the disposition was not so much as to the disponent himself in liferent, but directly to the disponees of what he should have at his death; so that the

No 119.

person then called needed no service ; the fee of the subjects remained with Mr Mercer, and went to his heir, from whom the disponee behoved to claim them ; but there was no fee vested in him by the disposition, and there is nothing to hinder the *jus crediti* to remain *in pendent* ; and suppose a land estate to have been left in this manner, the procuratory of resignation would not have been carried by a service.

Replied, Mr Scotland is served heir to his uncle, and by that title has recovered one debt ; and it is impossible to say what more he may have intromitted with.

This service was the only proper title, since Mr Mercer never denuded himself of the subjects ; he calls his disponees institutes and substitutes, and reserves power to alter ; so that the fee remained in him.

THE LORDS, 11th December 1744, in respect of the general service, found the defender liable in the debt pursued for.

On a reclaiming bill and answers, 23d January 1745, they found him not universally liable, but only to the value of the subject disposed ; and 5th June, on bill and answers, adhered.—*See REPRESENTATION.*

D. Falconer, v. I. p. 89.

Act. L. Craigie.

Alt. Da. Graham.

Clerk, Gibbon.

SECTION II.

How far the Disposition must be onerous, to elide the Passive Title.

1637. *January 14.*

COURTY *against* WEMYSS.

No 120.

It was covenanted in an eldest son's contract of marriage, that the tocher should be applied for redeeming a wadset ; and that the lands wadset should be disposed by the father to the eldest son and his heirs.

A disposition by the father,

ONE Mr David Courty, Minister, to whom umquhile Mr John Wemyss of Lothaker was addebted 1000 merks, pursuing Wemyss, his son, *hoc nomine*, as successor to him, *titulo lucrativo post contractum debitum*, to pay the debt foresaid ; and for instructing him to be successor, producing a sasine of the lands of Lothaker, proceeding upon his father's resignation ; and the defender *alleging*, That he could not be found successor by that sasine, because, the same was granted to him for satisfying of a contract of marriage, made betwixt the defender and his spouse, and the defender's father, and Ronald Murray, father to his said spouse, on the one and other parts, by the which contract it was appointed, that the sum of 8000 merks, contracted to be paid to him in tocher, should be paid to Mr James Wemyss, Commissary of St Andrews, for loosing from him of the lands of Lothaker, contained in the said sa-

sine, whereby he was alleged to be successor to his father, as said is; which lands were impignorated by his father to the said Mr James, redeemable upon the said sum; and which tocher being paid accordingly to the said Mr James, and he renouncing the lands, and the defender being thereafter infeft therein, albeit the infeftment proceeded upon his father's resignation, yet flowing from a cause onerous, he cannot be thereby found to be successor, to pay all his father's debts;—and the pursuer *replying*, That the defender being infeft in the said lands upon his father's resignation, must be found successor, and cannot defend himself with Mr James Wemyss's wadset, seeing, by this infeftment flowing upon resignation, he acquired more than the wadset, *viz.* both the superiority and the right of reversion, the lands being more worth than the wadset, and he, by the right produced, acquiring both the conjunct fee to his wife, and the heritable right of propriety to himself and his heirs;—and the defender *duplicating*, That he restricted his right only to the wadset, which was before competent to Mr James Wemyss, and which is now acquired by the defender, for the onerous cause, as said is; and he renounces all other right, which he may claim anyways by that infeftment, or any other manner of way, to the said lands, except the said wadset, which he is content should be redeemable from him, by any of his father's creditors, by payment of that sum; and further, Mr David Primrose, in name of Ronald Murray, father to the defender's spouse, compeared, and *alleged*, That, seeing by the contract of marriage, the said lands were provided to her in conjunct fee, and that for the payment of the tocher-good, which was paid, as said is, of no reason ought she to be prejudged of that benefit of her contract of marriage; neither ought his son-in-law to be found successor to his father thereby, and burdened with the heavy and unsupportable burden of his father's debt, by that infeftment; the preparative whereof was very dangerous to elude thereby conditions of contracts of marriage; specially seeing the defender, who is yet minor, *rebus integris*, renounces all benefit by the said infeftment, except the said wadset, as said is, which he has acquired *ex causa maxime onerosa*:—THE LORDS, in respect of the foresaid exception and duply, which they found relevant, found, that the said infeftment made not the defender to be holden as successor to his father, in respect that the defender retrenched the infeftment to the said wadset, and that he had not made any other benefit thereby, but *rebus integris* renounced all further benefit thereof, and was content that the lands should be redeemable from him, and also from his wife, by the creditors, upon payment of 8000 merks; and which being paid, and the same secured to his wife during her lifetime, the LORDS found to be equivalent to that part of the contract, whereby she was appointed to be provided to her liferent of the said lands; and found, that the provision to her of the said liferent of 8000 merks, to be in satisfaction thereof to her *pro tanto*, and that she being secured of her liferent of the said sum, that she and her husband ought to grant the lands lawfully redeemed, and should renounce all right she or he could pretend

No 120.
in implement of this contract, though in part lucrative, because the lands were worth more than the wadset sum, was found not to infer a *præceptie*, the son offering to restrict himself to the wadset.

No 120. thereto; and so the defender was not found successor by the said infeftment, although it bore more nor the wadset, and that the heritable right of the lands, whereto he was provided by that sasine, was far more worth than the sum of the wadset.

Act. *Gilmour et Craig.*

Alt. *Stuart et Primrose.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 36. Durie, p. 822.

166f. November 22. BOSWELL against BOSWELL

No 121.

Where it was alleged that the disposition was for onerous causes, nearly equivalent to the value of the lands, the Lords, before answer, ordered all instructions of the onerosity to be produced, in order to consider whether there was a considerable inequality.

JOHN BOSWELL pursues Boswell of Abden, as representing Henry Boswell his father, for payment of L. 1000, due to the pursuer by the said umquhile Henry, and insisted against the defender, as lucrative successor, by accepting a disposition of lands and heritage from the said umquhile Henry, whereunto he would have succeeded, and was therein his appearing heir. The defender *alleged*, He was not lucrative successor, because the disposition was for causes onerous. The pursuer *answered*, *Non relevat*, unless it were alleged for causes onerous, equivalent to the worth of the land; as was formerly found in the case of Elizabeth Sinclair against Elphingston of Cardon, *See APPENDIX*. The defender *answered*, *Maxime relevat* to purge this odious passive title of lucrative successor, which is no where sustained but in Scotland; specially seeing the pursuer hath a more favourable remedy, by reduction of the disposition, upon the act of Parliament 1621, if the price be not equivalent; and there it is sufficient to say, it was for a considerable sum, or, at least, it exceeded the half of the worth, for there is latitude in buying and selling; and, as an inconsiderable sum could not purge this title, so the want of an inconsiderable part of the full price could as little incur it.

THE LORDS, before answer, ordained the defender to produce his disposition, and all instructions of the cause onerous thereof, that they might consider if there was a considerable want of the equivalence of the price. Here the defender pleaded not, that he was not *alioqui successurus* the time of the disposition, being but cousin-german to the defunct, who might have had children.

Fol. Dic. v. 2. p. 36. Stair, v. 1. p. 62.

*** In conformity with the above case was decided Harper against Home,
No . p.

No 122.

A disposition of lands in an elder son's

1664. June 17. LYON of Muirask against LAIRD of ELSICK.

LYON of Muirask pursues the Laird of Elsie upon a debt of his father's, as successor *titulo lucrativo*. The defender *alleged*, Absolvitor; because any dis-

position he had from his father was in his contract of marriage, whereby 10,000 merks of tocher was received by his father, and 14,000 merks of debt more undertaken for his father, with the burden of his father's liferent. The pursuer *answered*, The allegiance ought to be repelled; because he offered him to prove, that the land disposed was then worth forty or fifty chalders of victual, so that the cause onerous was not the half of the value; and, therefore, as to the surplus, he was lucrative successor. The defender *answered*, That any onerous cause or price, though incompetent, was enough to purge this passive title; and albeit the pursuer might reduce the right, and make the lands liable, because the cause was not onerous and equivalent, yet he could not be personally liable *in solidum* for all the defunct's debts.

No 122.
contract of marriage, found not to make him lucrative successor, the father having got the tocher, and the son being burdened with certain debts; but the son was found liable *in quantum lucratus*.

THE LORDS having seriously considered the business, after a former interlocutor the last session, assoilizing from the passive title, but finding the lands redeemable by the pursuer, or any other creditor, for the sums paid out, did now find further, that the defender was liable for the surplus of the just price of the land, according to the ordinary rate the time of the disposition, and that the surplus, over and above what he paid or undertook, ought to bear annualrent, as being the price of land.

Fol. Dic. v. 2. p. 37. Stair, v. 1. p. 203.

* * * Gilmour reports this case :

1664. June 21.—THERE is an action pursued at the instance of John Lyon of Muirensk, against Bannerman of Elsieck, as successor *titulo lucrativo* to his father, in the lands of Elsieck and others, for payment of a debt owing by his father, before his right. It was *alleged*, That the right he had from his father was onerous, viz. his contract of marriage, by which, for 10,000 merks received by the father of his son's tocher, and for certain other burdens, wherewith his father had power to burden the lands, his father did dispose the estate to him. To which it was *answered*, That the tocher and burdens foresaid were not equivalent to the worth of the lands; so that, for the surplus, the defender was successor *titulo lucrativo*. It was *replied*, That the title being onerous, though there might be a surplus of the worth, that could not make him successor by a lucrative title; but all that it could work is, that the lands might be redeemable from the defender for the tocher paid, and other burdens truly undertaken, as was found *in anno* 1637 betwixt Wemyss of Lothacker and his father's creditors, No 120. p. 9790. at the least, that the lands should be really liable for the said surplus.

Which accordingly the LORDS found; and parties being *de novo* heard, they adhered to their former interlocutor, with this addition, that the surplus foresaid, as the same might be estimated the time of the contract, should not

- No 122. only be liable to the creditors after count, but also for the annual rent thereof, after the intending of the respective creditors their cause.

Gilmour, No 106. p. 79.

1671. November 22. BEATIE against ROXBURGH.

No 123.

BEATIE pursues Roxburgh as successor lucrative to his father, by a disposition produced, bearing for love and favour, and other good causes, redeemable by the father for forty shillings Scots. The defender *alleged*, That whatever was the tenor of the disposition, yet the true cause thereof was onerous, being granted for sums belonging to the son *aliunde*, intromitted with by the father, equivalent to the worth of the land, which uses always to purge this passive title, *quia debitor non præsumitur donare*.

THE LORDS found the defender lucrative successor by this disposition, the reversion making it evident to be a pure donation, and not given for any other cause.

Stair, v. 2. p. 8.

*** Gosford reports this case :

ROXBURGH being pursued as successor *titulo lucrativo* to his father, in so far he had disposed to him a tenement, which did bear for love and favour, and wherein there was a reversion, bearing a power to redeem for payment of 20 shillings Scots, which tenement he yet possessed many years after his father's decease; it was *alleged*, That that disposition, albeit so conceived, could not make him successor *titulo lucrativo*, because he offered to instruct, that his father was debtor to him, by intromission with great sums of money left to him by his uncle on the mother's side, far exceeding the worth of the tenement, and the disposition being conceived in such terms as his father pleased, when he was minor, and *in familia*, it ought not to infer a passive title against him, which would make him liable to all his father's debts, he himself being a true creditor.—THE LORDS did find, that the disposition being conceived as said is, was a lucrative title, and made him liable to all his father's debts, which was very hard.

Gosford, MS. No 401. p. 202.

No 124.

Where there is an onerous cause, altho' not fully equal

1676. February 15. HADDEN against HALIBURTON.

PATRICK HADDEN pursues George Haliburton as lucrative successor to his mother, by a disposition granted by her to him of lands wherein he was *aliunde*.

qui successurus, after contracting of the pursuer's debt, who *alleged* absolvitor, because the disposition bears to be for sums of money, and so is not lucrative but onerous. It was *answered*, That the narrative of the disposition proves not betwixt mother and son. Whereupon it was *alleged* by the defender, That any colourable title was sufficient to purge the passive universal title, but the pursuer might reduce upon the act of Parliament; *2do*, The cause onerous was offered to be proven.

THE LORDS found, that the disposition, with an onerous narrative betwixt mother and son, did not prove; but found, that if the cause onerous were proven, though not equal to the worth of the land, the defender should not be found simply liable, but *quoad valorem in quantum lucratus est*, without necessity of a reduction. See PROOF.

Fol. Dic. v. 2. p. 37. Stair, v. 2. p. 416.

1678. November 29. HIGGINS against MAXWELL.

JOHN HIGGINS having right to a bond, wherein umquhile ——— Maxwell of Munches was cautioner, pursues this Munches, as behaving as heir to his father, by intromission with the rents of the lands wherein his father died infeft. The defender *alleged*, Absolvitor, because his father was denuded by a disposition in his favours. The pursuer *replied*, That, by the disposition, he was successor to his father *titulo lucrativo post contractum debitum*. The defender *duplied*, *1mo*, That, by his mother's contract of marriage, his father was obliged to infeft the eldest son of the marriage in these lands, being the second marriage, and therefore the infeftment was but in implement of that obligation, anterior to his debt; neither were the lands provided to him as heir of the marriage; *2do*, The disposition bears to be for onerous causes, and debts paid and undertaken, which the defender offers to instruct otherways than in the narrative of the disposition. The pursuer *triplied* to the *1st*, That all obligations in favours of children are always understood to be in way of succession, whether it be to them as heirs, bairns, or as the eldest son or daughters, for thereupon the father could not be excluded from his liferent, seeing he might infeft his son at any time in his life; and if such clauses were otherwise interpreted, no creditor would be secure, but such latent clauses might still exclude them by infeftments granted thereupon after contracting other debts. To the *2d*, *Non relevat*, unless the cause onerous be proven equivalent to the worth of the land; for if it be not, it remains a lucrative title, and would give a rise to fraud, if a right onerous in some part would exclude this positive title, and put creditors to reduce.

THE LORDS found, that the infeftment to the eldest son made him liable as lucrative successor, although there was an obligation in his mother's contract

No 124.
to the worth
of the lands,
the disponse
is liable only
in valorem.

See in the next
case, that if
the cause one-
rous be incon-
siderable, a
passive title
will be incur-
red.

No 125.
An obligation
in a contract
of marriage,
to provide
the estate to
the heir of
the marriage,
found not to
be an one-
rous cause to
protect the
eldest son, to
whom the
estate is af-
terwards dis-
poned, from
being liable
as lucrative
successor.

No 125. to infest him, not having a determinate time, in his father's life, before contracting of this debt; but found the duply of the cause onerous relevant, reserving to the Lords, after probation, to determine as to the equivalency of the cause onerous to the worth of the land; for the Lords thought, that if the cause onerous was short of the worth considerably, as within the half or the like, that it would infer the passive title, but if it were near the worth, it would not, though there might be place for reduction to reach the excrescence.

Fol. Dic. v. 2. p. 36, & 37. Stair, v. 2. p. 648.

* * * Fountainhall reports this case :

HIGGINS against Maxwell of Munshes, for a debt of his father's, as successor *titulo lucrativo, p. c. d.* *Alleged*, He had the disposition for implement of his mother's contract-matrimonial, providing the estate to the eldest son.—THE LORDS repelled this. Then he *alleged*, He had it for onerous and adequate causes.—THE LORDS ordained, before answer, the pursuer to prove the worth of the lands, and the defender the causes; and declared, if they amounted to nine parts of the true price, dividing the price in twelve parts, they would not find it a passive title, but only decern him to pay the superplus. Some thought the contract being to the bairns of the marriage, his accepting a posterior disposition was not a passive title, and that he might retour his blood as bairn.

Fountainhall, MS.

No 126.

An obligation in a contract of marriage to provide the conquest to the heirs of the marriage, is not an onerous cause to protect the heir to whom the estate is afterwards disposed, from being liable as lucrative successor.

1705. November 21.

HENRY GILLESPIE, son to the deceast EDWARD GILLESPIE Merchant in Edinburgh, and RACHEL WATSON his spouse, *against* PATRICK GILLESPIE and his Spouse, and MARK and JAMES CARSES.

THE deceast Edward Gillespie, merchant in Edinburgh having, after disposing some tenements there to Mark, James, and Janet Carse his grand-children, disposed the same to Henry Gillespie, his eldest son and apparent heir, who obtained himself infest, and thereafter granted a new corroborative disposition to his said grand-children, who were thereupon infest, in regard, the first disposition in their favours wanted a procuratory of resignation and precept of sasine; a competition for mails and duties arose betwixt Henry Gillespie and Patrick Gillespie, who married the said Janet, and her two brethren.

Henry craved preference upon this ground, That although the disposition in favours of the Carse be anterior to his, his infestment was prior to theirs.

Answered for Patrick Gillespie and the Carse; 1. Edward Gillespie being first denuded by a disposition in their favours, he could not afterwards, in prejudice thereof, grant another right to his apparent heir; which second disposi-

tion is reducible as merely gratuitous, without any onerous cause, and cannot hinder their posterior infeftment on the corroborative disposition to be drawn back to the date of the first; 2. Henry, as successor *titulo lucrativo post contractum debitum* to Edward by his foresaid disposition and infeftment, is obliged to warrant their prior disposition, and therefore cannot impugn it.

Replied for Henry; That in all competitions of real rights, the first infeftment is still preferred; and the date of the posterior sasine cannot be brought back to the date of the first disposition, which contained no precept of sasine or warrant for infeftment: Nor was Henry's disposition gratuitous, since Edward could have been compelled to grant the same in implement of his contract of marriage with Henry's mother, whereby the whole conquest was provided to the heirs of that marriage, and consequently to him: 2. He could not be liable to warrant his father's disposition as *successor titulo lucrativo*, in so far as the posterior disposition to him had such an antecedent onerous cause as his mother's contract of marriage.

Duplied; However onerous a contract of marriage may be in favours of the wife, it is always gratuitous as to provisions in favours of heirs and bairns, and can never be opposed even to posterior creditors. Nor can it excec an apparent heir from the passive title of lucrative successor; November 29. 1678, Higgins *contra* Maxwell; No 125. p. 9795.; February 22. 1681, More *contra* Fergusson; No 116. p. 9781. Dirleton in his questions, title *successor titulo lucrativo*, is also of this opinion. 2. Though the disposition to the Carses were gratuitous, yet they are *in pari casu* with Henry, his disposition being also gratuitous: And in a competition betwixt two gratuitous assignees, the last assignation, though first intimated, is reducible upon the implied warrandice of the first, against future facts and deeds of the same nature; July 15. 1675, Alexander *contra* Lundy; No 64.-p. 940.

THE LORDS found the disposition made by Edward Gillespie to Henry, in his contract of marriage, was not onerous as to his interest therein, and could not prejudice the anterior disposition granted by the same Edward in favours of his grand-children the Carses; though Henry's right was first perfected by infeftment; in regard, he as heir or lucrative successor, could not quarrel or impugn his father's deed in their favours, but was liable to warrant the same; reserving to Henry's wife and children after his decease, to debate their interests in the said contract as onerous *quoad* them.

Fol. Dic. v. 2: p. 36. Forbes, p. 43.

* * * Fountainhall reports this case:

EDWARD GILLESPIE merchant, having two children, Henry, and Marion who was married to Captain Carse brother to Cockpen, and had by him Mark, James, and Janet Carses; and Janet being married to Patrick Gillespie; Edward the grandfather, disposes to the said three Carses, his grand-children, in 1686,

No 126.

some houses in Edinburgh; and thereafter he makes a right of the same houses to his son Harry, who is thereupon infeft in 1699; but the said Edward being induced to adhere to his first deed, which wanted a procuratory or precept of sasine, he renews the same, and grants a disposition in corroboration in 1702, whereupon the Carses, his grandchildren, are infeft; whereon they and Harry Gillespie their uncle, falling to compete for the mails and duties, it was contended for Harry, That though his disposition was posterior to theirs, yet it was first completed by infeftment, three or four years before theirs; and so, as having the first consummate real right, he was clearly preferable, by the 13th act, Parl. 1693. *Answered*, That Edward being denuded of the fee in favour of the Carses, his grandchildren, he could do no voluntary posterior gratuitous deed in prejudice thereof, especially to his apparent heir, without an onerous cause, and who as heir becomes liable to warrant the first disposition, being *successor titulo lucrativo post contractum debitum*. *Replied*, Heritable rights of lands are not validly transmitted by dispositions, till infeftment be taken thereon; and though the Carses had a naked personal right before him, yet he had the first infeftment, which must by all the rules of law give him preference; and the pretence that his right is gratuitous is false, because it depends upon Janet Nisbet his mother's contract of marriage with the said Edward, where the whole conquest *stante matrimonio* is provided to the heir of the said marriage, which he is; and his father could by no voluntary deed derogate from that clause of conquest, which makes the said Harry's right onerous, and to depend on that antecedent cause; whereas their right is uncontrovertedly gratuitous. *Duplied*, That Harry's right is still gratuitous; for the conception of the clause of conquest is not to the heir of the marriage, but expressly provided to the bairns to be procreate of that marriage, whereof the Carses' mother was one; and so she and her children *jure representationis* had as good right to the heritable conquest (though not so of moveables) as he had, and were *in pari casu quoad* that; and even in such provisions, the LORDS have found the parent had the power to arbitrate dispose and distribute the conquest among his children, as they deserved. Thus the LORDS decided lately, in Thomas Wylie's children's pursuit against their father, (*See APPENDIX*); and such obligations do not exeeem the apparent heir from implementing his father's deeds, nor purge the passive title of successor *titulo lucrativo*, 8th July 1625, Gray *; so that *esto* the disposition to the Carses be lucrative, so is yours; you Harry having got a considerable patrimony beside this; and wherever a competition occurs betwixt two gratuitous assignees, the last assignation, though first complete, is always reducible upon the implied warrandice of the first, against all future facts and deeds, as was found 15th July 1675, Alexander, No 64. p. 940.; and much more where the second right is to the apparent heir, who is liable in his predecessor's obligation for warrandice contained in the first deed, though incomplete; and though provisions in contracts matrimonial conceived in favour of wives may be

* Gray against Burgh, Durie p. 176, in the Appendix to this Title.

onerous, yet destinations to heirs or bairns are not so, and do not hinder but a disposition to an eldest son makes him successor *titulo lucrativo*. *Vid.* 29th November 1678, Higgins, No 125. p. 9795.; and 22d February 1681, More, No 116. p. 9781.; and Dirleton, *voce Successor titulo lucrativo*. THE LORDS found though Harry had the first complete right, yet seeing he was thereby heir and successor, he became liable to warrant his father's deed, in favour of the Carses, and so could not quarrel nor impugn the same; and therefore reduced his right, and preferred the first disposition made by Edward to the Carses, his grandchildren, before Harry's subsequent right, though first perfected by infestment.

Fountainhall, v. 2. p. 292.

S E C T. III.

The Debt must be anterior to the Disposition.—What understood to be an Anterior Debt.

1634. January 14.

OGILVIE against Ld MENSIR.

No 127.

A decree of violent profits against a father, after the disposition by him to his eldest son, was drawn back to a decree of removing, which was before the disposition, in order to be the foundation of a passive title; because the decree of violent profits was a consequence of the other.

SIR GEORGE OGILVIE of Carnossie, as executor dative *ad omnia* confirmed to his father, sought a decret of violent profits obtained by his father against umquhile Alexander Fraser of Mensir, to be transferred in himself *active* as executor foresaid, and *passive* in Alexander Fraser, son to the said umquhile Alexander, to whom he was successor *titulo lucrativo* in the said lands of Mensir. *Alleged*, No transferring against the defender as successor, &c. because offered to be proven, that if any way he succeeded to the said lands of Mensir, it was by virtue of his contract of marriage, whereby his father was bound to infest him in the same; which contract was long before the decret of violence, and so he cannot be convened as successor *titulo lucrativo post contractum debitum*, seeing the decret of violence is the only ground whereupon he is pursued. *Replied*, That ought to be repelled, except he would allege that the contract was before the decret of removing and warning, whereupon the decret of violence followed, and to which warning and decret of removing following on it, the said decret of violence ought to be drawn back; for the defender was constituted debtor by the said decret of removing. *Duplied*, The decret of violence is the only ground that makes the defender debtor to the pursuer, because

No 127. it liquidates the decret of removing. THE LORDS would not sustain the allegiance as it was proponed, except he would say as in the reply.

Fol. Dic. v. 2. p. 37. Spottiswood, (SUCCESSORS and SUCCESSION), p. 315.

* * Auchinleck reports this case :

THE Laird of Carnossie pursued Alexander Fraser, as successor to umquhile Alexander Fraser of Mensir his father *titulo lucrativo*, for making payment to him of the violent profits contained in a decret obtained by Carnossie's father against the defender's father. It was excepted by Alexander Fraser, that he cannot be convened as successor to his father in the land of Mensir, because he was infest by his father therein upon his contract of marriage, which contract was made before any decret of violent profits was obtained. To which it was *replied*, That the exception ought to be repelled, except it were *alleged* that the contract of marriage was before the decret of removing, whereupon the decret of violence followed ; for by the decret of removing, his father was constituted debtor, and the decret of violence was only a liquidation of the debt which depended upon the decret of removing. Which reply the LORDS found relevant.

Auchinleck, MS. p. 4.

No 128.

1637. February 23. LIGHTON against L. KINABER.

If a disposition be before the existence of the debt though infestment be after, there is no room for the passive title.

* * See this case, No 106. p. 9772.

No 129.

A son as lucrative successor *post contractum debitum*, was found obliged to enter heir to his father the wadsetter, in order to resign in favour of the reverser, because there was an obligation in the wadset to resign upon payment, which was before the

1668. January 14.

EARL of KINGHORN against The LAIRD of UDNEY.

THE Earl of Kinghorn did wadset to the deceast Laird of Udney the barony of Balhaves, and the sum due upon the wadset being paid to Udney, he did by his letter to the said Earl, promise a renunciation of the said wadset to be granted by him. The Earl of Kinghorn as heir to his father, having pursued the now Laird of Udney as representing his father upon the passive titles, and especially upon that, as successor *titulo lucrativo*, in so far as he was infest in the lands condescended upon acquired by his father to himself in liferent, and to the defender in fee, with power to the father or his assignee to redeem the same upon payment of three pounds, and to set, wadset, and dispone without his consent ; it was *alleged*, the sons right was prior to the said letter, and that the father did not make use of the said power. It was *replied*, That the wad-

set was prior to the defender's right yet, this right being qualified (as said is) the father might have contracted debts, and granted obligations after the said right, and the defender would be liable to the same, seeing the lands and the father's interest in the same being upon the matter a fee and power to redeem and dispoise, might have been comprised for his debt contracted after the said right.

There being two questions in the case, *viz.* Whether the defender be liable as successor *titulo lucrativo*, if it should be found that the wadset was anterior to the son's right? *2dly*, If the obligation shall be found to be after the defender's right, whether he would be notwithstanding successor *titulo lucrativo*, in respect of the quality and condition foresaid of the said right;

No 129.
son's disposition, though the order of redemption and repayment of the wadset sum to the father was after it.

THE LORDS repelled the allegiance, and found the defender would be liable as successor, the pursuer proving that the wadset was anterior: As to the second question, THE LORDS thought it not necessary to decide, being of very great consequence, and deserving hearing *in prasentia*, seeing it was notour that the wadset was before the defender's right; yet we inclined for the most part to think, that when such rights are granted or purchased by parents to their apparent heirs, they should be liable to all the debts due and contracted thereafter, at least *secundum vires et in quantum lucrantur*. And beside the above-mentioned reasons, these may be urged, *imo*, The father having by such a reservation, not only a reversion, but in effect a right of property, in so far as he has power to dispoise and wadset as if he were fiar, if he should discharge the said reservation, his discharge would infer against his son the passive title of successor *titulo lucrativo*, having] gotten thereby an absolute and irredeemable right which he had not before; and therefore, he not using the power competent to him by the said reservation, being equivalent as if he had discharged the same, ought to operate the same effect. *2do*, Such a right is in effect *præceptio hæreditatis cum effectu* only the time of the father's decease, seeing before that time it is in his power to evacuate the same; and therefore the time of the father's decease is to be considered so as the son cannot be said to have right or to succeed effectually before that time, and so ought likewise to be liable to the debts contracted at any time before his father's decease.

Fol. Dic. v. 2. p. 37. Dirleton, No 130. p. 53.

* * Stair reports this case:

1668. *January 15.* THE Earl of Kinghorn pursues the Laird of Udney, as representing his father, to denude himself of a wadset right, granted by the late Earl to the defender's father, conform to the defunct's missive letter, acknowledging the receipt of the sums of the wadset, and obliging himself, all written with his own hand; and craved that the defender might enter and infest himself in the wadset, and resign in favours of the pursuer, that the lands might be purged thereof; and insisted against the defender, *imo*, as lawfully charged to

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enter heir, who offered to renounce to be heir. The pursuer *answered*, He would not suffer him to renounce, because he offered him to prove that he was lucrative successor by the disposition of the lands of Udney, whereunto there is an express reservation in favours of his father, to dispoⁿe, wadset, and grant tacks, and therefore any deed done by his father, behoved to affect him, at least the fee of the estate ; so that, albeit this letter be posterior to the disposition of the estate it must burden the same, and the defender *quoad valorem*. 2do, The letter produced, acknowledges a wadset, and payment made, and it is offered to be proven, that the letter was anterior to the disposition of Udney ; so that by the receipt of the wadset sums, the defunct was (by the nature, and tenor of the rights of wadset) obliged to resign in favour of the pursuer, and therefore the defender succeeding to him by this disposition, after that obligation to denude himself upon payment, is obliged, as successor *titulo lucrativo post contractum debitum*, to denude himself ; and that the wadset was prior to the disposition of Udney, was offered to be proven. The defender *answered*, That the provisions in his infestment could never affect him nor the estate, because there was nothing in the provision, that the estate should be liable to the debts contracted by the defunct thereafter, but only that he might dispoⁿe, or wadset, or redeem for an angel ; and it cannot be subsumed, that the letter produced doth import any of these, but at most a personal obligation. 2do, Albeit it were notour, that there had been such a wadset before the defender's disposition of his proper estate, yet it behoved to be also instructed, that it was paid before that disposition ; but his father's missive after his disposition, could never instruct that it was paid, or paid before, and yet the defender offered to renounce all right he had to the wadset lands, or to suffer a certification and improbation to pass against the same, seeing they are not extant or produced ; or to consent that the LORDS would declare upon the letter, that the wadset thereby was redeemed and extinct ; which last the pursuer would have accepted, providing the defender would give a bond of warrandice for his father's deed and his own, which the defender refused.

THE LORDS proceeded to determine the point *in jure* ; and as to that point anent the provision in the defender's infestment, some were of opinion, that any debt contracted by the father would affect the estate, others thought not, there being no provision to contract debt, but to wadset or dispoⁿe, which was not done ; and all agreed, that the case being new, and now very frequent, required a more accurate debate ; but the LORDS found that the defender's father, having by his letter acknowledged the wadset, and the payment thereof, to which wadset the defender had no right, that any grant of redemption by the father (after his disposition to his son) was probative against the son, and that the letter being proven holograph, did instruct the wadset to be paid ; and therefore found it relevant to the pursuer, to prove that the wadset was before the defender's disposition, and that it did import a conditional obligation, that the father should resign upon payment, and that the son's disposition being after

the wadset, he was lucrative successor, after that obligation contracted by the wadset.

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Stair, v. 1. p. 506.

1674. June 7.

— against HEPBURN.

No 130.

THE apothecary Patrick Hepburn's son, being pursued as successor *titulo lucrativo*, for a debt of his father's, upon that ground, that though the right of lands granted to him by his father was before the debt, yet it was revocable, and under reversion to the father, upon a rose noble, when he contracted the debt libelled ;

THE LORDS assoilzied from the passive title foresaid, but reserved reduction. It appears that the case was not without difficulty ; and that albeit future creditors in some cases may reduce anterior rights *ex capite fraudis*, yet this is difficult and unusual ; and therefore it had been fit to determine that point, viz. Whether an apparent heir, getting a right revocable, and of the nature foresaid, should be liable at the least *in quantum* ; seeing if the father had discharged the reversion, he would have been successor, in respect of the discharge after the debt ; and the son was a child, and the father reserved and retained possession, and upon the matter, the father's not redeeming was a discharge of the reversion.

Act. ———.

Alt. Hog.

Fol. Dic. v. 2. p. 37. Dirleton, No 184. p. 74.

1678. July 23.

FERGUSON against LINDSAY.

No 131.

Succession lucrative was found not to be inferred by an infestment posterior to the pursuer's debt, it being on a contract of marriage anterior to the debt.

THOMAS FERGUSON pursues William Lindsay, as representing his father, for payment of his father's bond of 1600 merks, and insists against him as successor lucrative *post contractum debitum*, by an infestment in lands upon his father's disposition ; which infestment is posterior to this debt, and therefore he is successor after this debt, and *ex causa lucrativa*. The defender answered, *non relevat*, unless the debt had been anterior to the disposition ; for that passive title is always understood of a successor *ex causa lucrativa, quæ causa est post contractum debitum* ; for the infestment is but in implement of the disposition *et necessitatis*, though the disposition be *voluntatis*. The pursuer replied, That his debt is both anterior to the infestment, and the disposition upon which it proceeds. The defender replied, That the disposition is not the cause of the infestment, but a contract of marriage, disposing the same lands ; and though this disposition doth not relate to the contract, yet it is presumed to be in implement thereof, and the father might have been compelled upon the contract to

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extend the disposition, with procuratories and precepts to complete the infeftments.

THE LORDS found the defence relevant, that the same lands were disposed by contract of marriage, before contracting the pursuer's debt, though this disposition and infeftment thereon was posterior to the debt.

Fol. Dic. v. 2. p. 37. Stair, v. 2. p. 639.

1714. July 22.

No 132.

A party being held as confessed upon an account referred to his oath, the Lords found his eldest son liable to pay the debt as lucrative successor, by a disposition posterior to the account, though prior to the decree.

JOHN DOUGLAS, Taylor in Edinburgh, against WILLIAM COCHRAN of Ochiltree.

IN a process at the instance of John Douglas, as having right from William Douglas his father, against William Cochran of Ochiltree, as lucrative successor to the deceased Sir John Cochran his father, for payment of L. 1315 Scots due by Sir John to the said William Douglas by an unsubscribed taylor-accompt about the year 1679, and contained in a decret obtained against him, for not compearing to depone in July 1713 upon the said accompt, that it was resting owing ;

Answered for the defender ; Seeing the passive title of lucrative successor makes the heir liable only for such debts as were contracted before the date of the disposition in his favour, he cannot be liable to pay the debt pursued for ; because, *1mo*, The disposition, though posterior to the said accompt, is prior to the constitution of the debt by the said decret against Sir John, which only made him debtor, and cannot operate *retro* to make the father as debtor before, for by the decret he is not held as confessed upon the time of furnishing the articles of the accompt, but only that he was really owing the same ; and the obligation arising *a re judicata jurata*, or from the parties being held as confessed, is considered as a transaction or original obligation or contract betwixt the parties ; so that it cannot be drawn back, l. 26. D. De jurejur ; *2do*, *Esto* the decret were probative of the time of furnishing, it cannot be probative against the defender, to whom Sir John was denuded by an anterior disposition, and as to whom it was *res inter alios* : For though he had granted bond to any creditor, declaring it to be for a debt due to him before the disposition to the defender, that would not have been respected as lawful probation to subject him to the debt ; else it were easy for a father, having disposed his estate in his son's contract of marriage, to make the disposition elusory at his pleasure, by granting bonds under his hand, declaring himself to have been debtor some time before the right granted to his son : And a decret, holding Sir John as confessed, upon a presumption of law, cannot have greater effect against the defender, than if his father had owned it under his hand.

Replied for the pursuer ; *1mo*, As the furnishing was before the disposition to the defender, so the obligation to pay was also before, arising from the time of

completing the contract, which must be distinguished by suing implement thereof by process. It is true, were the competition with a lawful creditor before obtaining of the decret, something might be said; but, when the debate is with a lucrative successor, who is considered as *eadem persona* with his predecessor, *tempus contractus* is only regarded. And if Sir John had been liable only in a conditional obligation, during the pendency whereof he had disposed his estate to his son, it will not be disputed but that *existente conditione* the son would be liable; since, in that event, *retro pura censetur obligatio*. How much rather is he liable in the present case, where the obligation was simple from the time of the furnishing.

THE LORDS found the defender liable for the debt pursued for.

Fol. Dic. v. 2. p. 38. Forbes, MS. p. 95.

SECT. IV.

How the Passive Title of Lucrative Succession is purged. What sort of Creditors have the Benefit of this Passive Title.

1633. January 15. MR ALEXANDER KINNEIR against L. EASTNISBET.

No 133.

It was sustained as a defence in a pursuit upon this passive title, that the disposition in the defender's favour stood reduced, though the reduction was in absence.

IN an action for registration of a bond granted to Mr Alexander Kinneir, by the defender's father, the defender being convened as lawfully charged to enter heir, for eliding whereof he renounced; and being convened as successor to his father *post contractum debitum*, for verifying whereof two infestments being produced, viz. the father's right, and the infestment given to the defender by his father's disposition; and the defender excepting, that this disposition could not make him liable as successor to pay the debt of his father, because that right made to him is reduced; and the pursuer *replying*, That that reduction is for non-production only, the defender being absent, whereby he may reduce when he pleases that decret reductive, and therefore he ought either to pay the debt libelled, or else to renounce all right which he can pretend to the lands by virtue of that right, that the pursuer may otherwise thereupon either seek adjudication or comprising of these lands contained in his rights alleged reduced; the LORDS found that the defender's infestment produced, being standing reduced, (albeit for non-production) could not prove him successor; neither found they it necessary to compel the defender to renounce all right as the pursuer desired, for the right standing reduced made to the defender, then the rest subsisted in the person of the granter thereof who was the

- No 133. direct debtor, whereby the creditor might comprise the same from him, and whenever the defender should obtain the decret redutive taken away, then the pursuer had this action safe against the defender, as successor unprejudged, which then he might prosecute as he pleased; and, in the mean time, he might serve inhibition against the defender, that he might do no deed to the pursuer's prejudice.

Act. Craig.

Alt. Stuart.

Clerk, Gibson.

Fol. Dic. v. 2. p. 38. Durie. p. 665.

No 134.

1636. January 27. STRAITON against CHIRNSIDE.

It was found relevant to infer this passive title, that the heir's right was reduced *in foro contentioso* by one of the father's creditors. And it being *replied*, That the heir got a sum of money for ratifying the decret of reduction; this was not respected, because it was taking a sum not to be successor. But the LORDS found, That if the pursuer could qualify any prejudice by this ratification, it might be considered how far such prejudice would be sufficient to bind this passive title upon the heir.

Fol. Dic. v. 2. p. 38. Durie.

*** This case is No 17. p. 5395. *voce* HEIRSHIP MOVEABLES.

No 135.

1705. November 21.

GILLESPIE against CARSES.

A PARTY who had only one son, and grandchildren by a deceased daughter, dispoised his estate, first to the grandchildren, and thereafter to his son, who obtained himself first infest. In a competition, the LORDS found, That though the son had the first complete right, yet seeing he became thereby lucrative successor, he was bound to warrant his father's deed in favour of the grandchildren, and could not quarrel the same; upon which ground the grandchildren were preferred.

Fol. Dic. v. 2. p. 38. Fountainhall. Forbes.

*** This case is No 126. p. 9796.

DIVISION III.

Apparent Heir three years in possession.

1707. July 1.

WALTER SYMPSON, Servant to Robert Boyd, Writer in Edinburgh, *against*
 JEAN HAMILTON, Daughter to Claud Hamilton of Garrin.

No 136.

IN the competition betwixt the said Walter Sympson and Jean Hamilton, the LORDS found that an adjudication against an apparent heir for his own debt, who had been three years in possession but never infest, is not sufficient to prefer the adjudger in a competition for mails and duties with one deriving right by dispositions from persons infest as heirs-portioners to the remoter predecessor last infest; without prejudice to the said adjudger to pursue these heirs passing by their immediate predecessor to make them personally liable for his debt, as accords in the terms of the act, 24th Sess. 5. Parl. William and Mary. (1695.)

Fol. Dic. v. 2. p. 40. Forbes, p. 175.

1724. January 17.

AGNES MUIRHEAD *against* DAVID MUIRHEAD.

No 137.

THE investitures of the estate of Drumpark, standing in favours of heirs-male, John Muirhead apparent heir of that estate, *anno* 1697, in his contract of marriage with Agnes Welsh, proceeding upon the narrative, that he was not infest, 'obliged himself to provide the lands, in case of no male children of the marriage, in favours of the female children, and to grant all writs and securities requisite thereanent.' John died uninfest, leaving a daughter, Agnes, only child of the marriage; whereupon David Muirhead, heir-male of the investiture, passing by John, was served heir to the last infest, and expedite a charter and infestment; against whom Agnes insisted in a declarator of her right by the said contract of marriage, upon the 24th act, Parl. 1695, her father, apparent heir, having been more than three years in possession.

One passing by an apparent heir three years in possession, is liable to implement the apparent heir's rational deeds in his contract of marriage.

It was *pleaded* for the defender, That the act of Parliament respects only onerous *debts* and *deeds*; to secure which only, was the act introduced; and as gratuitous alienations are not favourable, *in dubio* they will never be understood to be comprehended.

It was *answered*, That provisions and conveyances in contracts of marriage, are both favourable and onerous; so far from gratuitous, that they tie up the husband from making gratuitous deeds in their prejudice; and the words of the act being general, viz. *debts* and *deeds*, since it is even a question, whether

No 137. gratuitous debts and deeds should not be comprehended, there can be no doubt about rational deeds in contracts of marriage.

"THE LORDS, in regard that John, though not infest, was three years in the possession of the estate, found the obligation in the contract of marriage binding on the heir-male."

Fol. Dic. v. 2. p. 40. Rem. Dec. v. 1. No 44. p. 88.

* * * Edgar reports this case :

1724. February 11. DAVID MUIRHEAD of Drumpark, grandfather to these parties, disposed his lands, in a contract of marriage *anno* 1671, in favours of his eldest son Robert, his heirs-male, of line, tailzie, and provision.

Robert was infest upon this right, and John his son succeeded him, but was never served heir to his father, nor infest. He, in the year 1697, in his marriage-contract with Agnes Welsh, obliged himself to provide the lands of Drumpark to the female children of the marriage, in case there should be no males.

Agnes Muirhead, the only child of John, raised a declarator of her right by virtue of the said contract of marriage, against David Muirhead (grandson to old David by his younger son James) heir-male of the investiture, who passed by John, who had been upwards of three years in possession of the estate, and served himself heir to Robert who was last infest. Her declarator was founded upon the 24th act, Parl. 1695, whereby it is provided, That if any man, since the act 1661, served or shall hereafter serve himself not to his immediate predecessor, but to one remoter, he shall be liable for the *debts* and *deeds* of the person interjected, to whom he was apparent heir, and who was in possession of the lands and estate, to which he was served, for the space of three years.

It was *pleaded* in defence for David, That the law had no where said, that an apparent heir not infest, though three years in possession, might alter the settlements made by his ancestors, and convey the lands, in the same manner as he might have done had he been infest; for that would have contradicted an undeniable principle, that one can transfer no more right than he has; and that an apparent heir, in the naked right of his apparenacy, cannot by his *deed* transmit an estate to which he has no right. *2do*, That the act of Parliament was intended only for a security of onerous *debts* and *deeds*, such as the contractor could have been compelled in his lifetime to have paid or implemented, but could never be extended to provisions in a contract of marriage, which were not to take effect till after his decease; and that the Legislature could not intend that total alienations of estates should be made in such a manner.

It was *answered*, That the word *deeds* being expressed in the act of Parliament as well as *debts*, they must be taken *cum effectu*, and that none of them were to be looked upon as useless; and whether the word *deeds* might be extended to such as were gratuitous, the pursuer did not need to dispute, because

her case was a provision in a contract of marriage, which was both rational and onerous; and the pursuer did not plead, that the defunct, as apparent heir three years in possession, could make a valid conveyance or settlement of the estate, but only contended, that the obligation by him in his contract of marriage, providing the lands to the heirs-female of the marriage, was effectual, by the act 1695, to compel the defender, as heir in the investiture, to denude in favours of the pursuer.

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THE LORDS found, That by the contract of marriage *in anno* 1697, the destination was altered in favours of heirs whatsoever; and in regard that John, though not infeft, was three years in possession of the estate, found the obligation in the contract of marriage binding on the heirs-male. See No 66. p. 8955, *voce* MINOR.

Reporter, Lord Kimmergham
Clerk, Gibson.

Act. Ja. Fergusson, sen.

Alt. Ja. Graham, sen.

Edgar, p. 28.

1726. January 26. Marquis of CLYDESDALE against Earl of DUNDONALD.

No 138.

ONE passing by an apparent heir three years in possession, and serving to a remoter predecessor, is not bound to fulfil the gratuitous debts and deeds of the apparent heir, and has relief of what debts he pays of the apparent heir against the apparent heir's representatives in any separate estate.

Fol. Dic. v. 2. p. 40. Rem. Dec.

. This case is No 3. p. 1274.; *voce* BASE INFESTMENT.

. A similar decision was pronounced February 1727, Mitchell against Wilson.
See APPENDIX.

1729. January. Lord HALKERTON against DRUMMOND.

No 139.

AN apparent heir three years in possession of an infeftment of annualrent, having uplifted the same, and granted discharge and assignation, it was found that another apparent heir, passing him by, and serving in the annualrent to a remoter predecessor, could not quarrel the said discharge and assignation. See APPENDIX.

Fol. Dic. v. 2. p. 39.

1733. December 19. JOHNSTON against STEIL.

No 140.

THE defunct's estate, in which he died infeft, being a wadset holding base of the reverser, in which there was a back-tack continuing the reverser in pos-

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session, and obliging him to pay the neat annualrents of the wadset sum in name of tack-duty, and the apparent heir of the wadsetter uplifting these tack-duties for three years, this was found a possession in terms of the statute, so as to subject the next apparent heir who passed him by, to his onerous debts and deeds.

The possession of a relict by a liferent right granted by her husband, the defunct proprietor, found not to be the apparent heir's possession in the sense of the act 1695, so as to involve the apparent heir, passing him by, in a passive title. See APPENDIX.

Fol. Dic. v. 2. p. 40.

No 141.

1736. *January 8.* JANET SINCLAIR *against* JOHN SINCLAIR of Rattar.

A son possessed an estate without making up any title thereto, in which his grandfather had died infest. He was found not liable, on the act 1695, to the creditors of his father, who had died in a state of apparen- cy, after being more than three years in possession.

By contract of marriage betwixt the deceased John Sinclair of Rattar and the said Janet, he provided her, in case she survived him, to the liferent of certain lands, which he continued to possess many years, but died without making up any titles thereto.

Whereupon she brought a process against the said John Sinclair her son, in order to make the provisions in her contract effectual; and insisted particularly on the passive title introduced by the act 1695, her husband having been more than three years in possession.

Pleaded for the defender; The above act can give the pursuer no aid; seeing it provides only for the creditors of the interjected apparent heir, where the next heir succeeds to the remoter predecessor, either by serving heir to him, or by adjudication on his own bond; but the defender is not in either of these cases, in so far as he has not served heir to the remoter predecessor; neither does he possess the estate upon an adjudication on his own bond. And, the statute being correctory of our common law, cannot be extended from the cases specially mentioned to others that are omitted.

Answered for the pursuer; Her action is well founded, both on the first and second clauses of the act, whether they are considered separately or jointly. And, with respect to the first, which ordains, "That, if any man shall serve himself heir, or by adjudication on his own bond, succeed not to his immediate predecessor, but to one remoter, as passing by his father to his grandfather, or the like, then, and in that case, he shall be liable for the debts and deeds of the person interjected, to whom he was apparent heir, and who was in possession of the lands and estate to which he is served for the space of three years, and that in so far as may extend to the value of the said lands and estate, and no farther." Now, though this clause mentions only the next heir succeeding to the remoter predecessor by service or adjudication, these being the ordinary methods of heirs making up titles to their predecessor's estate; yet that does not exclude the case, where the next heir bruits the estate by other

titles authorised by law, or without making up any whatsoever; seeing the titles specially mentioned are only intended to exemplify the statute, which must be understood in the most extensive sense, so as to comprehend all the cases, where the next heir possesses the estate of which the interjected apparent heir was three years in possession, in order that he may be liable to the debts and deeds of the interjected person to the value thereof; seeing what the law intended to prevent was the fraud committed against creditors upon the decease of their debtors, through the contrivance of apparent heirs; and the specific fraud this act had in view to remedy, was, that heirs not only refused to represent the interjected apparent heir, but carried off the estate to the prejudice of his creditors, by entering to the remoter predecessor; to remedy which it provides, That the heir, in such case, shall be liable to the deceased apparent heir's debts who was three years in possession; and which must take place, whether the next apparent heir renounces to be heir to the interjected person or not, or whether he passes by him expressly, by serving heir to the remoter predecessor, or tacitly, by possessing as apparent heir to the remoter predecessor, seeing that must be constructed, in the eye of law, a passing by the interjected; as it is obvious, that the next apparent heir, who refuses to pay the interjected person's debts, must acknowledge that he possesses upon some title or other, and the only one that his possession can properly be ascribed to, is the right of the predecessor who stood last infeft, which is plainly a passing by the interjected person.

In the *next* place, it observable in this clause, That the person interjected is not only called predecessor to the next heir, who, passing by him, serves heir to the remoter predecessor, but likewise such next heir is said to be apparent heir to the person interjected; wherefore the interjected person, who, after possessing the estate three years, died in a state of apparency, is, by this law, deemed predecessor, and the next heir esteemed apparent heir to him in the estate so possessed, though he never make up a title thereto, and that in order to subject him to the deeds of the interjected person; consequently the defender's possessing his grandfather's estate (who died in the fee thereof) as apparent heir to him, must, by the intendment of the statute, be esteemed as possessing the estate of his father, the interjected person, in order to subject him to his debts.

And, though this action is well founded on the first clause, yet it receives additional strength from the second; which statutes, " That, if any apparent heir for hereafter shall, without being lawfully served or entered heir, either enter to possess his predecessor's estate, or purchase the same, or rights affecting the same, otherwise than as the highest offerer at a public roup, without collusion, his foresaid possession or purchase shall be reputed a behaviour as heir, and subject him to all his predecessor's debts and deeds, as if he were served and entered heir to him.

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Now, though the principal design of this clause seems to respect the creditors of the predecessor who was last infeft, yet it must likewise be understood to give a security to the creditors of the interjected apparent heir who was three years in possession; as it expressly declares the apparent heir's possessing, upon any other title whatever, other than as highest bidder at a public roup, to be equivalent to an actual service in the lands; consequently the defender's possessing, his grandfather's estate is, by this act, declared to be the same as if he were served heir to him; so that he must be in the same case with respect to his father's creditors, as if the service were actually expedited; seeing it is absurd to suppose his possessing, without making up any title to his grandfather, should put him in a better situation than if he had purchased rights to the estate wherewith to clothe his possession. And, if the defender's doctrine were to take place, it would follow, that, whenever the interjected person had contracted debts to the value of the estate, if his heirs refused to serve, and abstained from possessing, the creditors would not only be defeated of their payment, but the estate might become caducious, and fall to the Crown; or, as abandoned and derelinquished, become a wilderness; but no such consequences ought to follow from this act; since it should receive execution in the following manner, viz. if the next heir possess the estate of a remoter predecessor, he ought to be decerned to the value thereof in an action at the instance of the creditors of the interjected person; or, if he abstain from possessing altogether, when it is only affectable by the creditors of the interjected predecessor, a decret declaratory should pass, upon a proof of the deceased debtor's being three years in possession, whereupon adjudication may follow, so as the estate might be subjected to their payment; and, even supposing the statute were defective, the Court ought to lay down a rule in order to its being carried into execution. Thus the Lords introduced a method, when the heir of the debtor lay out unentered, whereby an adjudication *cognitionis causa* proceeded upon a renunciation, in obedience to a charge to enter heir.

Duplied for the defender; That an heir entered is deemed, by the law of every country, as *eadem persona* with the defunct; and, if one intromit with the defunct's effects, he is likewise considered as heir, and liable to his debts, under different limitations, conform to the laws of each place; but, that one should be liable to the debts and deeds of another, to whom he is not served heir, and of whose estate he cannot take a shilling, must be admitted to be contrary to the common rules of law. It was unknown in Scotland till this statute; and therefore, if the maxim, 'Quod contra juris regulas est introductum,' hold in any case, it must in the present, where one is subjected to the debts of a party to whom he is not heir served, and who has left no estate to the party subjected to his debts. If the law is viewed in this light, it is plain, that the defender cannot be liable to his father's debts, upon the first clause; seeing the passive title, introduced by it, can only take place in the two instances therein mentioned; the Legislature having left all other cases to be de-

terminated by the rules of common law, which, it is believed, the LORDS will not judge themselves empowered to break in upon, further than has been done by the statute; on the contrary, the general indefinite words of this act have always been restricted, as often as opportunities occurred, so that it might derogate as little as possible from the common law; particularly, though the words of the statute are general, comprehending all debts and deeds of the apparent heir, whether gratuitous or onerous; yet the COURT has found, that it concerns only the onerous debts and deeds of the apparent heir; therefore the pursuer argues unjustly, when she pleads, that the defender's possession of his grandfather's estate is a virtual passing by his father; seeing he could not take nor possess it as his father's, no more than if his father had died before his grandfather. But, supposing that possessing of the grandfather's estate was a passing by the father, still the law has not declared it to be a passive title, so as to subject him to the apparent heir's debts; as it has limited the passive title, thereby introduced, to the two cases above mentioned, leaving the creditors, in every other instance, upon the same footing they were before the date of the act.

And, with respect to the *second* clause, it relates to a quite different matter from what is provided for by the first; as it concerns only the creditors of a defunct, who was proprietor of an estate, and who were liable to be defrauded by the arts of his apparent heir, neglecting not only to serve heir to his predecessor, but likewise purchasing in adjudications, &c. in order to avoid payment of his debts, whereby his predecessor's creditors were often obliged to dispute with him concerning the validity of his titles; to remedy which, the second clause is calculated. But there is not, in the whole clause, one word of the creditors of an apparent heir; nor could it well be, as they were provided for by the first part of the act, as far as was judged necessary by the Legislature. Further, this second clause concerns only the creditors of a predecessor, whose estate might have been taken by his apparent heir's serving to him; which cannot apply to the estate of an apparent heir, which is none, in the construction of law, as it cannot be taken up by a service. *2dly*, The diligence supposed to be acquired is such as affected his predecessor's estate; which cannot relate to the apparent heir, whose debts cannot affect the estate to which he never had made up any title. *3dly*, This clause makes no mention of the predecessor's possessing the estate; therefore, should it be construed to extend to the creditors of an apparent heir, it would repeal the former clause; as it would secure the creditors of an apparent heir, though he had never possessed the estate.

As to the observation made for the pursuer, That, by the second clause, "An apparent heir's possessing his predecessor's estate is declared equal to a service; and that, by the first, such service to his predecessor subjects him to the apparent heir's debts;"—it is *answered*, That the argument is founded on several mistakes; for the second clause neither did, nor could say, That an apparent heir's possessing or purchasing diligences against his predecessor's

No 141. estate was equal to a service, without overturning our feudal rights; seeing possession alone can never establish a feudal right in lands. It indeed saith, That the apparent heir's possession or purchase shall be reputed a behaviour as heir, and an universal passive title, to the same extent as if he had been actually served; but the service there is only mentioned in order to determine the extent of the passive title; and not at all with a view that the possession or purchase was to have all the other legal effects of a service; consequently it cannot answer the first clause of the act, which requires an actual service. Further, this second clause makes the purchase or possession an universal passive title only in favours of the creditors of the predecessor, whose estate might have been taken by a service, but gives no benefit to the creditors of an apparent heir.

In the *next* place, as to the argument, That "the apparent heir, who was three years in possession, is designed predecessor to the party, passing by and serving heir to the person who died in fee of the estate; and therefore, in the second clause, he must be comprehended under the general designation of predecessor;"—it is *answered*, That, in the first clause, the apparent heir is called predecessor, and is made a predecessor to the heir, entering under the limitations therein mentioned; and so far only is he made a predecessor to a person who can take none of his estate; but it will not from thence follow, that, in a posterior part of the act, which speaks of a predecessor in general, that this is also to be interpreted of a person to whom one neither has nor can succeed; seeing a predecessor is a legal word, which, when indefinitely expressed, can only denote one to whom the apparent heir may actually succeed.

Lastly, As to the suggestion, "That, if the defender's doctrine were to take place, the fee of an estate might remain for ever *in hereditate jacente* of the person last infeft, by the heir's refusing to make up titles; whereby, as he would have no right himself, so he would exclude the creditors of a former apparent heir; wherefore the Court ought to find out a remedy, by allowing an adjudication to pass upon the apparent heir's debt;"—it is *answered*, That, as the law neither has, nor intended to give a remedy in such a case, the Court cannot introduce one, by obliging any person to enter heir to his predecessor, unless he think fit; which, in this case, might be attended with very bad consequences. *E. g.* Suppose that the debts of the person last infeft were equal to the value of the estate, and that the debts of the apparent heir were of the same extent, if, in such a case, the heir was obliged to enter, he would be liable to the apparent heir's creditors *in valorem* of the estate, and to his predecessor's creditors to the full extent of their debts, whereby it would be in their power to allow the creditors of the apparent heir to evict the value of the estate, and leave the heir entering subject to pay it a second time to them out of his own estate; therefore it was just and reasonable to allow the heir to choose whether he would subject himself to the apparent heir's debts or not, leaving

the estate to be affected by his predecessor's creditors who had a legal interest therein.

No 141.

THE LORDS found the heir not liable.

And, upon a reclaiming bill and answers, the LORDS adhered. After which, the pursuer gave in a new petition, upon a different *medium*, craving, That her son might be found liable from time to time *in valorem* of his intromission, chiefly founding on an argument drawn by analogy from the decision, 3d November 1682, Blyth, No 87. p. 9742. *2do, Et separatim*, she insisted, That, as the Lords had formerly modified an *interim* aliment to her; therefore she again craved, That they would modify one *super jure naturæ*. THE LORDS modified L. 50 Sterling.

C. Home, No 6. p. 19.

1741. December 9. LEITH and his Factor against LORD BANFF.

It had been found in the year 1736, in a question between the Lady Ratter and the apparent heir of that estate, (*supra*) than an apparent heir does not become liable upon the act 1695 to the debt of the preceding apparent heir, who had been three years in possession, by his possessing his predecessor's estate, but only by serving to the remoter predecessor last infeft, or by making up titles by adjudication on his bond, which are the terms of the statute; and beyond which, being a correctory law, and introducing a passive title *contra communes juris regulas*, it was not to be extended.

No 142.

An apparent heir, possessing the estate, but not making up titles, is not liable upon the act 1695 to the debts of the preceding apparent heir.

The like case now occurring, and the President declaring himself of a different opinion from that judgment, a hearing in presence was appointed, that the point might be fully settled; and upon the hearing, the LORDS "gave the like judgment as in the said former case."

Fel. Dic. v. 4. p. 46. Kilkerran, (PASSIVE TITLE.) No 5. p. 369.

*** C. Home reports this case:

JOHN Lord Banff, after possessing his estate for several years, (at least more than three), died in a state of apparenacy, whereupon it devolved to Alexander his younger brother, who continued to possess the same, without making up any titles thereto. James Leith, a creditor of John's, brought a process against Alexander the present Lord, alleging, that the defender had, under the title of his apparenacy, intromitted with the rents which fell due in his brother's time, as well as those since his death; and therefore concluded, that he should be liable to the pursuer in payment. The defender renounced to be heir to his brother; whereupon this question occurred, Whether, notwithstanding the renunciation, he was liable for his brother's debts, in consequence of the statute 1695?

No 142.

For the pursuer it was *urged*, That as the law has considered three years possession of the apparent heir to be sufficient to constitute the creditors *in bona fide* to contract with him, and consequently had in view, that creditors so contracting, should recover their payment out of the estate, to which that apparent heir might have completed his titles; so the same statute considers it as fraudulent on the part of the apparent heir, who thus lay unentered, to the prejudice of his just and lawful creditor, which fraud was specially intended to be thereby remedied. Both the rubric and recital of the statute bear to be for correcting the frauds of apparent heirs; consequently it ought to be constructed in the most favourable way, so as to remedy the evil which it intended to obviate: And if this is the principle that the law proceeds upon, it ought surely to be extended *de casu in casum*, so as to obtain what was obviously the intention of the legislature; nor is [it any objection, that the enacting words allenarly respect the case of an heir actually served, or, by his own bond, succeeding to a remoter predecessor; since the statute had not only in view to obviate the frauds of apparent heirs, but also to provide for the payment of the just and lawful creditors of the apparent heir. It was not the making up of titles in this or the other way that was designed to be remedied, but the use that was made of the titles so established, to avoid payment of the debts of the apparent heir; as, to this hour, even since the act, these are the most proper, if not the only methods of connecting the titles to the person who died last infest. And this should hold the more especially as there are no taxative words in the law, to limit the benefit intended, to the two cases specially mentioned. Suppose the case, that the defender had obtained from the superior a precept of *clare constat*, and been thereon infest as heir to his predecessor, who had died last vest and seized; in propriety of language, this would not be an actual service, or succeeding by adjudication to the apparent heir's own bond; yet as, in the eye of law, it was doing the very same thing in another shape, it is impossible to think, that the legislature [could possibly mean, that such person should thereby get free from payment of his immediate predecessor's debts. Were the act to be otherwise construed, this absurdity would follow, that the apparent heir's possession, without making up any titles, which is a sort of vicious intromission, and infers a general passive title, would be more beneficial than a regular entry, though, in all other instances, the irregular addition is attended with penal consequences, from which the heir regularly entering may be free. Besides, the pursuer's plea is even founded in the words of the law, by which the person interjected is called the predecessor of the apparent heir, who passes him by, as well as the person last vest, to whom the apparent heir connects by service; and by a posterior clause, the apparent heir possessing is made universally liable to his predecessor's debts; that is, both to the debts of the interjected person, and of the predecessor last vest and seized; consequently the defender is liable on the statute to pay the Lord's debts, the last Lord Banff being, in the sense of the act, the defender's predecessor.

Answered for Lord Banff, That by the common law of Scotland, where the rule does not obtain, that *mortuus sedit vivum*, the debts of an apparent heir dying unentered, died with himself; they could not be made effectual against the estate, nor against the next apparent heir passing him by: The statute 1695, introducing a remedy in this case, cannot, nor does not go upon any intentional fraud in the next apparent heir, who himself had never made up any titles to it; and therefore cannot be supposed to intend any fraud in passing him by. It was intended solely to relieve creditors, lending their money to a personal possession, either not strictly enquiring, whether the borrower is infest, or hoping that he will soon take that step for his own benefit and theirs. It is a correctory law, introducing a passive title *contra communes regulas juris*, consequently cannot be extended *de casu in casum*: So far as it provides a remedy, it is the part of Judges to apply it; but where it stops short, they cannot go on to provide further remedy: This would be a legislative power which Judges have not. It is likewise a mistake to suppose, that, in all cases where an apparent heir has been three years in possession, there must be a remedy in law to make his debts effectual. Let us suppose, that the next apparent heir, instead of passing him by, contracts debt to the value of the subject, and allows the estate to be carried off by legal diligence for payment of those debts; In this case, there is no remedy provided for the interjected apparent heir's debts. And several others may be figured, even where titles are directly made up to the estate by the apparent heir passing by, for which the law has provided no remedy. At first view, it may naturally be thought the intention of the statute, to oblige an heir, in whatever manner he makes up titles to the estate, to pay the debts of the interjected apparent heir, who was three years in possession, so far as he is benefited by the succession. Even this fails in several instances: But surely the act never intended, that an heir continuing in apparen- cy, without making up any titles, should be liable to the interjected heir's debts, to the value of that estate, of which possibly he has not uplifted one full year's rent. And it is a mistake to say, that the interjected person is considered as predecessor to the apparent heir who passes him by, because, though the statute talks of a man's succeeding to his immediate or remoter predecessor, it does not follow, that, when one succeeds to a remoter predecessor, the person interjected must also be understood to be a predecessor. *2do*, Supposing the act were inaccurately worded, which is by no means the case, yet it would be an unsound method of interpretation, to carry this inaccuracy to the second clause, in which it is most obvious, that, by the word predecessor, is meant the person who died last vested and seised, and denied that he had touched any of the rents which fell due in his brother's lifetime.

THE LORDS found the present Lord Banff's intromission with the rents falling due, during the apparen- cy of the last Lord, does not infer a passive title,

No 142. but makes him liable to the last Lord's creditors *in valorem* of his intromissions; and repel the passive title alleged on the act of Parliament 1695.

C. Home, No 186. p, 309.

* * * This case is also reported by Lord Kames :

JOHN Lord Banff, after possessing his estate for three years, during which time he contracted great debts, having died in the state of apparenacy, one of his creditors brought an action upon the passive titles, against the present Lord Banff, brother to the deceased, concluding, that he should be found liable upon the act 1695, as being now in possession of the estate. He *urged, 1mo*, That, though he could not subsume upon the express words of the first branch of the statute, since the defender was not served heir to the remoter predecessor, passing by the interjected apparent heir; the equitable construction of the statute was for him, the fraud being as great, to possess the estate without acknowledging the interjected apparent heir's debts, as to serve to the remoter predecessor without acknowledging them. *2do*, That he was in the case provided for by the second branch of the statute, and could subsume in terms thereof, that the defender's possession of the estate subjected him universally to the predecessor's debts; because, in the sense of this act, the interjected apparent heir is a predecessor whose creditors are provided for.

To the *first* it was *answered*, That the statute 1695, being a correctory law, it would be assuming no less than a legislative authority, to extend the remedy beyond the letter of the statute. To the *second, answered*, The interjected apparent heir is not a predecessor in the sense of the statute; nor is it any part of the intendment of the second branch, to afford his creditors relief. The first branch of the statute is calculated for their relief; and so far are they secured by it, that the next heir-apparent is barred from making up a feudal right to the estate, without doing justice to these creditors *in valorem*. The purpose of the second branch is, to provide an additional check against the fraud of heirs-apparent, who, by possessing upon singular titles, found means to elude all the checks formerly contrived; and the additional check is, to make the possession of an heir-apparent, whatever his title be, an universal passive title, equally as if he were entered heir, so as to subject him to all the debts of his predecessors; that is, to the debts of those who died infest in the estate. To interpret this clause so as to benefit the creditors of the interjected heir-apparent, is to make the statute inconsistent with itself; for, upon that footing, the heir in possession would be liable to the debts of the interjected heir-apparent, not only universally, but even though the interjected heir-apparent should die without possessing a month; contrary in both articles to the first branch of the statute.

" THE LORDS assoilzied the defender."

Rem. Dec. v. 2. No 23. p. 37.

1754. December 12.

GRANT *against* SUTHERLAND.

No 143.

By the President's casting vote, it was carried that the statute 1695, as correctory of the common law, must be strictly interpreted; and therefore, that the possession of the heir who forbears to make up a title to the land estate of his ancestor, does not make him liable to the debts or deeds of the interjected heir-apparent.

Fol. Dic v. 4. p. 46. Sel. Dec. No 71. p. 96.

. This case is reported in the Faculty Collection :

By marriage-contract between James Sutherland of Pronsie and Isabella Grant, James bound himself to provide her in a certain jointure.

At this time, James, as apparent heir to his predecessor, was in possession of the estate of Pronzie, but had never made up any title thereto; in this manner of possession he continued till he died.

After his death, David Sutherland made up no titles to the estate, but continued to possess it as apparent heir, in the same manner that James had done.

Isabella Grant brought a process against David for payment to her of her jointures.

David's defence against the action was, That James not being infeft, had no power to make a jointure effectual against the estate; and he not having connected himself with James, was not bound by his deeds.

Isabella *answered*; That, for the deeds of the first apparent heir, three years in possession, the act 24th, 1695, bound the second apparent heir, either making up titles to a remote predecessor, or not making up titles at all.

The abstract question came to be, whether an apparent heir, possessing the estate, but not making up titles to it, was bound by the onerous deeds of the immediately former apparent heir three years in possession.

The statute, so far as regards this question, consists of two clauses. By the *first*, upon a recital 'of the frequent frauds and disappointments that creditors suffer upon the decease of their debtors, and through the contrivance of apparent heirs to their prejudice, it is enacted, That if any one serve himself heir, or, by adjudication on his own bond, shall succeed, not to his immediate predecessor, but to one remoter, as passing by his father to his good-sir, or the like, then he shall be liable for the debts and deeds of the person interjected, to whom he was apparent heir, and who was in the possession of the lands and estate to which he is served for the space of three years, and that in so far as may extend to the value of the lands and estate, and no further.' By the *second* clause it is enacted, That 'if any apparent heir shall, without being lawfully served or entered heir, either enter to possess his predecessor's estate, or any part thereof, or shall purchase any right thereto, or to any legal dili-

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‘ gence or other right affecting the same, otherwise than the said estate is exposed to a lawful public roup, and as the highest offerer thereat ; his foresaid possession or purchase shall be reputed a behaviour as heir, and a sufficient passive title to make him represent his predecessor universally, and to be liable for all his debts and deeds, as if the said apparent heir possessing or purchasing, as said is, were lawfully served and entered heir to his said predecessor.’

David Sutherland *pleaded* his defence in this manner :

By the general law of Scotland, an estate not vested in a person by proper titles, could not be made liable for his debts, nor had the creditor of an apparent heir, who died unentered, any remedy against his estate.

Certain frauds committed by apparent heirs, made some exceptions from this rule necessary. These exceptions are contained in the act 1695. This act did not mean to overturn the general law, but to correct it in some instances.

The first clause of the statute 1695 introduced an exception, where one not vested in an estate, but remaining apparent heir in it, has continued to possess it for three years ; the next heir who, passing him by, serves heir to a former predecessor, or who, by adjudication on his own bond, as charged to serve heir to a remote predecessor, takes up the estate, shall be subject to his debts to the extent of the estate ; but here the defender has neither served, nor taken up the estate of Pronsie by adjudication on a trust-bond ; therefore he is not liable on the first branch of the statute.

Again, by the ancient law of Scotland, if the heir lie out unentered, the creditor of his predecessor could not reach even the estate in which the predecessor had been vested. To remedy this, the act 106, 7th Parl. James V. 1540, and 27, Parl. 23. James VI. 1621, were made, empowering creditors to reach the estate of their debtor, though he had not been vested in it.

To elude these facts, and to be able to compete with the creditors, apparent heirs fell upon a contrivance of purchasing in diligences against the estate, and possessed it as creditors when they refused to possess it as heirs.

The remedy which applied to the evil which occasioned the statutes 1540 and 1621 was too weak ; for all that the heir could lose by his obstinacy was the estate itself, and there was no remedy applied to the other evil at all.

To increase the penalty in the one case, and to invent a penalty in the other, the second branch of the statute 1695 was passed, which subjected the apparent heir possessing, yet not serving to the person last vested, or purchasing in diligences affecting the estate of the person last vested, not only to the value of the estate, but to the extent of the whole debts of his predecessor who was so vested ; but James Sutherland was never vested ; therefore the defender is not liable on the second branch of the statute.

The first clause regarded an apparent heir, who, to elude the debts of the last apparent heir three years in possession, passed him by, either by serving

to a remote predecessor, or by being charged to serve to him on his trust-bond. The last clause regards the apparent heir who, to elude the debts of the person last vested, avoids serving to him, or purchases diligences affecting his estate; and the statute in question, being a correctory law, and a penal law derogating from the general law of Scotland, is strictly to be interpreted, and ought not to be extended to cases beyond the letter of the act.

Answered for Isabella Grant; The view of the statute 1695, was to obviate all the frauds of apparent heirs that could be used. It is not penal; it is only preventive of fraud, and enabling the general rules of law and justice to take place. Where there is a defect in the common law with regard to the prevention of fraud, and a remedy is provided by a correctory statute, that statute ought to be extended to every fraud that falls within the purview and reason of it.

In this view the defender is liable, even on the first clause of the statute; for the particular frauds enumerated in that clause, are only descriptive of the common methods in which apparent heirs took up their predecessors estates; but are not meant to limit the remedy to those frauds only, but on the contrary are meant to comprehend every other device by which apparent heirs took up their predecessors estates, passing over the interjected apparent heir. If it provided for the fraud of those who made up titles in a certain way, is it to be supposed, it intended no provision for the fraud of those who made up no titles at all?

Again, he is liable even on the words of the second branch of the statute; for that branch is directed against those who, in order to disappoint the creditors of the former apparent heir, continue to possess the estate under the naked title of apparenacy.

The words in this branch, 'enter to possess his predecessor's estate,' cannot mean the estate of the person last vested, but must mean the estate of the former apparent heir; for the first branch of the statute, speaking of one who makes not up a title to the former apparent heir three years in possession, calls that apparent heir immediate predecessor. If then predecessor in the first clause means apparent heir, it cannot in the second clause be transmuted, and made to apply to a different person, to wit, the predecessor last vested.

The same thing appears from the consequence of a contrary construction.

It never was doubted that the apparent heir possessing became thereby universally liable for the debts of the remoter predecessor who died last vested; could it then be in the view of the Legislature, in a branch of this correctory statute, to enact what was formerly known to be undoubted law; this branch then relates to one succeeding to an apparent heir, and not to one succeeding to the person last vested.

According to the construction pleaded for the defender, this statute, calculated to obviate the frauds of apparent heirs, would give the strongest encouragement to those frauds; for then an apparent heir refusing to enter, might

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hold the estate without paying the debts of the immediate apparent heir, which debts the statute in question was intended to protect.

‘ Found, that David Sutherland is not liable to pay the pursuer, Isabella Grant, her annuity in her contract of marriage with James Sutherland; and therefore assoilzied.’

Act. Macdowal, W. Grant, And. Pringle.
J. D.

Alt. Ferguson, Brown, Simon Fraser.
Fac. Col. No 121. p. 178.

* * This cause was appealed :

THE HOUSE OF LORDS ‘ Ordered that the interlocutors complained of be affirmed.’

1796. December 7.

JOHN BUCHAN, Trustee for the Creditors of DAVID LOCH against DONALD MACDONALD.

No 144.

The possession of a judicial factor is not held equivalent to the possession of the heir apparent, so as to make the succeeding heir liable for his debts, in terms of the act 1695.

AN action of ranking and sale of the estate of Appine, belonging to Dugald Stewart, having been brought in 1757, it was sequestrated, and a judicial factor appointed over it, with the usual powers.

Dugald Stewart died in 1764, upon which Anne Stewart his daughter and heir of provision, within a year after his death, made up inventories, with the view of entering heir to him *cum beneficio*.

She was afterwards called as a party in the action of sale, and took various steps in it, in order to encrease the reversion. In particular, she stated objections to the debts of several creditors, and also obtained a delay of the judicial sale, in the hope of selling the estate more beneficially by private bargain.

Having failed, however, in this, the estate was sold judicially in September 1766. The purchaser's entry was declared to be at Whitsunday 1767; and after paying Dugald Stewart's creditors. there was a reversion of the price, amounting to L. 595 : 9 : 3^d.

In 1770, Anne Stewart married David Loch; and by an ante-nuptial contract of marriage, in consideration of certain provisions made on her and the children of the marriage, she conveyed to him her whole real and personal estate; and afterwards, by a separate deed in June 1772, she specially conveyed to him her right to the reversion of her father's estate.

Mrs Loch died in September 1772, without leaving children, or making up titles heir of her father.

Her husband having become bankrupt soon after, he put his affairs into the hands of a trustee, for behoof of his creditors.

The purchaser of Appine having also become bankrupt, his estate was sequestrated, and a factor appointed on it, who, in 1795, brought a multiple-

poinding, in order to have the right to the reversion of the price which still remained in the purchaser's hands ascertained.

Appearance was made for Donald Macdonald, who claimed it as heir of Dugald Stewart, on the failure of Anne Stewart, his daughter.

On the other hand, John Buchan, trustee on Loch's estate, *contended*, That it belonged to his creditors, because Mr Macdonald could not take up the reversion without serving heir to Dugald Stewart; and by doing so, rendering himself liable, in terms of the act 1695, for the onerous deeds of Anne Stewart, who had been in possession, in virtue of her apparency, for three years before the purchaser's entry.

In defence, Mr Macdonald

Pleaded; The act 1695 being correctory of the common law, is to be strictly interpreted; 26th January 1726, Marquis of Clidsdale, No 138. p. 9809.; February 1727, Mitchel, (See APPENDIX); 12th February 1736, Lady Rattar, No 141. p. 9810.; 1st July 1707, Sympson, No 136. p. 9807.; 13th May 1735, Graham, (See APPENDIX.) Now, in order to subject the remoter heir to the passive-title which that act introduces, the apparent heir whom he passes by, must have been three years in the actual possession of the estate; whereas the estate, during the whole of Anne Stewart's apparency, was in possession of the judicial factor.

Neither does this case fall within the spirit of the enactment. Its object was to prevent those creditors of apparent heirs from being defrauded, who, from seeing the apparent heir in possession of his ancestor's estates for years together, very naturally contracted with him, on the belief that he had made up his titles; Erskine, b. 3. tit. 8. § 94. But no person could contract with Anne Stewart on that supposition, as the estate was sequestrated, and in possession of the Court before her father's death.

Answered, It is sufficient to entitle the creditors of an apparent heir to the benefit of the act 1695, that he has been three years in the possession of it; 10th February 1758, Yule, No 45. p. 5299.; 27th June 1760, Irvine, No 33. p. 5276. Now, the sequestration of an estate gives the Court merely a temporary right of custody, for behoof of the common debtor and his creditors; 18th June 1747, Earl of Galloway, No 160. p. 7438.; 30th November 1785, Campbell *voce* TACK. The proprietor's infeftment in the lands still remains; consequently he retains the civil possession of them, and by paying his debts, he may instantly put an end to the right of the Court and recover the natural possession also. In this case, therefore, the possession of the judicial factor was in fact the possession of Dugald Stewart, and at his death came to be the possession of his daughter.

From the judicial steps too, which she took, with a view to encrease the reversion of the price, her creditors were entitled to presume, that it was her property, and as much subject to her debts as if she had been in the actual possession of it.

No 144.

THE LORD ORDINARY 'preferred Donald Macdonald to the sums in the hands of the raisers of the multiplepoinding.'

A reclaiming petition for John Buchan was appointed to be answered; and the Court, considering the case to be attended with great difficulty, afterwards ordered memorials.

On advising them, several Judges thought the Lord Ordinary's interlocutor should be altered. Mrs Loch (it was observed) had exerted herself to the utmost to encrease the reversion; and from the steps publicly taken by her for this purpose, her creditors had reason to suppose that it was her property. Besides, she had an undoubted right, in consequence of her apparency, to draw the interest of the reversion from the time when the estate was sold; and had she done so, it would have been impossible to maintain that she did not attain possession of it. But to give the creditors of an apparent heir the benefit of the statute, it does not seem necessary that he should have drawn the rents; it is sufficient that he should have had it in his power to do so. This is not a naked civil possession like that of a fiar, while the subject is possessed by the liferenter.

A majority of the COURT were however of opinion, that the creditors of an apparent heir could not avail themselves of the statute, unless their debtor had ~~actually~~ attained possession, which it was admitted Mrs Loch had not done.

THE LORDS 'adhered.'

Lord Ordinary, *Justice-Clerk Braxfield.*

For Buchan, *G. Fergusson, Ja. Gordon.*

Alt. Solicitor-General Blair, Macleod Bannatyne.

Clerk, Home.

R. D.

Fac. Col. No 5. p. 12.

DIVISION IV.

Vitious Intromission.

S E C T. I.

In which circumstances intromission does or does not infer a Passive Title.—Action transmits against heirs *in valorem* only.

1623. December 5. SCOT against LIVINGSTON.

No 145.

A widow's intromission with a small quantity of

In an action betwixt Scot *contra* Livingston, the defender being convened, as universal intromissatrix, for a debt owing by the defunct, her husband, it being *alleged*, That there were executors nominated in the defunct's testament,

who, conform thereto, intromitted;—this was repelled, because the executor was not confirmed; likeas the LORDS found, That the qualification against the defender, of her intromission with a mean quantity of the defunct's goods, viz. the selling of five bolls of corn, and the slaying and eating of four or five sheep, and the retention of other thirty sheep, which she had yet extant, was not sufficient to constitute her universal intromissatrix, and so to pay the whole debt, but only sustained the same to that effect, viz. to make the said particulars forthcoming, wherewith she should be proved to have intromitted. This was found, because it was thought hard that so small quantity of intromission should bring on the whole burden of the defunct's debts on her, and to make her as universal intromissatrix to answer for all, albeit her intromission was with goods, which was not necessary, there being no fraud on her part.

Act. Lawrie.

Alt. Cockburn.

Clerk, Gibson.

Fol. Dic. v. 2. p. 41. Durie, p. 86.

No 145.
the defunct's
goods was
found not suf-
ficient to con-
stitute her
universal in-
tromitter.

1624. March 20.

COCHRAN against STURGEON.

IN the action pursued by James Cochran, burgess of Edinburgh, against Helen Sturgeon, as intromissatrix with the goods of her umquhile husband, for payment of a debt owing by her husband to the pursuer;—the LORDS sustained the action against the relict as intromissatrix, notwithstanding that she alleged that there were executors confirmed, in respect that they were not confirmed before the raising of the principal summons in this cause, and before the execution thereof, albeit they were confirmed before the day of compareance, to the which the defender was summoned; which was found not to be sufficient, albeit the Commissaries in their judicatories admit confirmations, before litiscontestation, to be sufficient to liberate persons convened as intromitters, which is not received before the Lords: And where the defender would have purged his intromission, being condescended to be of wares in her husband's merchant booth in the town of Dunse, where he dwelt, such as pepper and spices, and such like other wares, which she alleged were sold by her, for the supply and necessary entertainment of herself and her bairns in meat and drink, having no other means wherewith to entertain them; the same was not sustained, but the LORDS found that she was answerable, as intromissatrix, to the pursuer, for his debt owing by her husband.

Act. Nicolson, younger.

Alt. Miller.

Fol. Dic. v. 2. p. 41. Durie, p. 121.

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No 146.
Found con-
trary to the
above.

No 147.

In libelling
vitious intro-
mission, the
pursuer need
not conde-
scend on par-
ticulars.

1630. *January 12.* ADAMSON *against* The LAIRD of FREELAND.

If one be convened as intromitter with a defunct's goods, the pursuer must condescend upon the particular intromission, to the end that the defender may purge it if he can; but if he be convened as universal intromitter, there needs no condescendence be made by the pursuer. The defender may if he please allege, that any intromission he had was of such and such particular goods, which he purgeth: And if the pursuer will allege any further intromission, let him condescend and he shall answer.

Nota.—That, after the particulars intromitted with by the defender, given in ticket, the pursuer may condescend in general only, that he offers to prove, that by and attour the particulars given in ticket, the defender intromitted with diverse other things, *ex. gr.* with more kine, horse, corns, &c. providing he be particular in the species, although not *in individuis*.—*January 14. 1630.*

Fol. Dic. v. 2. p. 46. Spottiswood, (UNIVERSAL INTROMITTER.) p. 352.

* * * Durie reports this case :

1630. *January 12.*—THE relict pursuing the heir of her father-in-law, to employ 2000 merks to her in liferent, whereto he was obliged by her contract of marriage; and the heir *alleging* payment made to her umquhile husband of that sum, conform to his discharge; and the pursuer *replying*, That that discharge not being subscribed by her, could not prejudice her; and the defender *duplicating*, That she was universal intromissatrix with her umquhile husband's goods, and so should warrant the discharge; and the pursuer *alleging*, That the defender should condescend upon the particulars of her intromission, which being declared, she should purge the same; and the other *alleging* no necessity to be special, seeing he alleged that she was universal intromissatrix, and which was relevant in law against her, without condescending, and if she would purge her intromission with any particulars, it was her own part to be special thereon, and he should answer thereto;—the LORDS found, That the defender alleging the pursuer to be universal intromissatrix, needed not to be special, and could not be compelled to condescend upon the particulars of her intromission; but if she would purge her intromission, she ought to do the same, and be special thereon, as she best might, being her own deed.

Act. Stuart.

Alt. Aiton,

Clerk, Hay.

And in this same cause, upon the 13th January 1630, the relict producing a ticket of the particulars of her necessary intromission, and the party offering to prove further intromission, whereon the relict alleged that the party ought to condescend in special, that she might elide the same; the LORDS found, That

the party replying that the relict was further intromissatrix with the defunct's goods, viz. corns, cattle, and all others his goods, besides the particulars which were purged as necessary; and that she was universal intromissatrix, therefore that he needed not further to be more special; for if she would purge any more intromission had by her, she ought to give the same up herself; but where the party alleged that she was universal intromissatrix, besides the particulars which she purged, he needed not be more special; but the Lords declared, That they would consider after probation was renounced, at the advising of the cause, if as much should be proved as would make her liable as universal intromissatrix.

Durie, p. 478.

No 147.

1633. January 12.

— against BRUCE.

In a pursuit of registration of a bond of 500 merks against Bruce of Stanstill in Orkney, as universal intromitter with the defunct's goods, who was granter of the bond, the defender was found universal intromitter, and decret given *eo nomine* against him; albeit it was proved only that he intromitted with a hat of the defunct's, an iron saw, and a chest, and a brazen pistolet pertaining to him, whereof no price was proved, and with a horse, which was sold for L. 80, there being nothing further of any more intromission proved to be had by the defender; neither ever was it proved what other goods the debtor had, or who had intromitted therewith, nor that ever being enquired at the witnesses, albeit the debtor was a gentleman who had heritage. And it was not found enough, (as some of the Lords thought expedient) that the defender should be decerned to make the particulars and prices thereof, whatever the same might be proved to be worth, forthcoming to the pursuer, and not thereby to make him liable to the whole creditors, as universal intromitter; for the Lords thought, That he being vitious intromitter, and without a title, or possibility of a title, albeit he had intromitted with any goods of the smallest moment and quantity that might be, and the debt never so great, yet by that intromission, which could not be warranted in law, he was subject to pay the whole debt; but this process was deduced against the defender not compearing.

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 41. Durie, p. 663.

No 148.

A person who intromitted with articles of small value, but without title, or the pretence of a title, found universally liable.

1636. February 5. MOWAT and DAGERS against PENNIE.

UMQUHILE DAGERS having pursued Christian Pennie before the Commissaries of Edinburgh, as executrix to Dagers his debtor, for payment of the debt; and after litiscontestation, the said Christirn Pennie, dying, this act and process is de-

No 149.

One of two sisters, who had lived in the same house, having sold some

No 149.
trifling ar-
ticles belong-
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other, was
found uni-
versally li-
able.

sired to be transferred in Bessie Pennie, sister to the defender, as universal intro-
missatrix with her goods and gear; which summons being admitted to probation
against her, (she not compearing) the Lords found the summons proven against
her, and decerned against her *hoc nomine* as universal intromissatrix, albeit the pro-
bation bore this only, and no more, viz. That the two sisters dwelt together in
a little house, where the said sister died, after whose decease the other sister the
defender, intromitted with a little timber bed and a pint stolp, which pertained
to the defunct, and which the defender sold, and all wherewith she intromitted
were not worth so much money as would pay a term's mail of the house where-
in they dwelt, and would not extend to six or seven pounds, or thereby; which
the Lords found sufficient to make her liable as universal intromissatrix, seeing
no party compeared to propone any defence of hypothecation of the said goods
to the said heritor for the house mail, albeit the debt for which the defender was
pursued, exceeded hundred pounds.

Act. Mowat.

Alt. ———.

Clerk, Gibson.

Fol. Dic. v. 2. p. 41. Durie, p. 792.

1668. February 26.

REOCH against COWAN.

No 150.

REOCH pursues Cowan, as representing a defunct, to pay a debt due by the
defunct to the pursuer, who *alleged* absolvitor, because Reoch was vitious in-
tromitter with the defunct's goods, in so far as he lifted L. 50 belonging to the
defunct, and gave his discharge, produced; and albeit thereafter he confirmed
himself executor dative, yet he wilfully omitted that sum out of the confirma-
tion, and so, as vitious intromitter, is both debtor and creditor, and cannot pur-
sue the heir.—It was *answered*, That this was *res modica*, and could not infer
the passive title.

THE LORDS found that this sum inferred not a general passive title, but only
that it made him accountable for the sum.

Fol. Dic. v. 2. p. 42. Stair, v. 1. p. 537.

1675. June 15.

LAIRD of ABERCAIRNIE against NICOL.

No 151.

IN a concluded cause at the instance of the Laird of Abercairnzie against
Nicol, as behaving as heir, or vitious intromitter with his father's goods, for pay-
ment of one year's rent due by his father;

THE LORDS found vitious intromission proved by the defender's making use of
his father's tools and instruments, who was a wright, and the son being also a
wright, and continuing to work with the same, albeit there was only one wit-
ness that proved that he disposed or sold any part of the work-looms.

Fol. Dic. v. 2. p. 41. Stair, v. 2. p. 329.

. Gosford reports this case :

June 5. 1675.—IN a pursuit at Murray of Abercairnie's instance against Nicol, as representing his father, at least vitious intromitter, in so far as he being a wright, he did make use of the work-looms, and employed the same for the space of a whole year after his father's decease, ought therefore to be liable for his father's debts;—it was *alleged* for the defender, That the making use of work-looms could infer no passive title, or make him vitious intromitter, seeing the defender having nothing left him, and being but a tradesman, did employ the same for his livelihood for some time; but his mother, who had intromitted with all the rest of his father's means, did thereafter sell and dispose upon the said work-looms, and so she could only be pursued as vitious intromitter.—THE LORDS did repel the defence, and decerned Nicol to make payment; which seems hard, he not being an apparent heir, nor having made profit by a vitious intromission; and passive titles being of so great import, ought to be qualified with great circumstances.

No 151.

—Gosford, MS. No 755. p. 469.

1705. *June 29.*

PATRICK ARCHIBALD, Merchant in Leith, *against* GEORGE LAWSON, late Treasurer of Edinburgh.

IN the action at the instance of Patrick Archibald against George Lawson, the LORDS found the transporting of a person's chests or trunks after his death, from the place where he died to the defender's house, relevant to infer vitious intromission against him; and that the inventorying and rousing of the goods by virtue of a posterior warrant from a magistrate, (though before commencing of the pursuer's process) did not purge the vitiosity; albeit a subsequent confirmation, prior to the citation at the pursuer's instance, would have purged the former intromission.

No 152.

Fol. Dic. v. 2. p. 41. Forbes, p. 19.

. Fountainhall reports this case :-

THE deceased Bailie Lawson, being debtor to the said Patrick Archibald in L. 250 Scots, he pursues George, his nephew, for payment, on the passive title of vitious intromitter, in so far as the defunct having lodged in one Jaffray's house, he left sundry trunks, household furniture, and goods in that chamber, which George caused transport after his death to his own house, without any disposition or other right thereto. *Alleged*, That the defunct was so poor, that he had no goods, at least they were of so mean a value, that they would not defray the expense of his funerals, and he neither sold nor disposed upon any of them, and so cannot be properly called an intromitter; and within two or three days after his death, he applied to a Bailie, and procured a warrant to inventory and roup them, which was accordingly done; and afterwards he confirmed himself executor-creditor, which was more than sufficient to purge and

No 152. elide the odious passive title of vitious intromitter; seeing *quilibet titulus coloratus excusat a vitio*; and if he did transport them before he had a title, it was only *custodia causa*, and for preservation from embezzlements; so the most that can be inferred against him is only for single restitution, or to be liable in the price of the goods sold; but not to import an universal passive title. *Answered*, If the nearest of kin, or others be allowed to put their hands summarily, and be assoilzied on procuring warrants *ex post facto*, there shall never be an intromitter overtaken; but the moveables of debtors shall be abstracted and concealed; and our law knows no way to secure this, but a legal confirmation, and till that was gone about, his method was to have got them sealed up and sequestrated, as is prescribed by the act of sederunt 23d February 1692, concerning the inventorying the writs and goods of defuncts; whereby it appears his meddling and transportation of the goods at his own hand was most unwarrantable; and his posterior inventorying by order of a Bailie, and then confirming, can never purge, because the Bailie's warrant was not the *habile way*, and the confirmation was posterior to the raising and executing of the pursuer's summons against him; and if these were once sustained, there would be variety of devices and contrivances invented, to defraud just creditors. THE LORDS found the subsequent warrant nor confirmation did not purge the antecedent intromission, nor liberate him from vitious intromission; but in regard it was alleged for the defender, that any goods he transported were in his uncle's lifetime, and not after his death, the LORDS thought this, if true, altered the case; and allowed them a conjunct probation as to the time.

Fountainhall, v. 2. p. 279.

1713. *January 22.*

JANET STARK and DAVID TAM, her Husband, *against* GEORGE JOLLY,
Writer in Edinburgh.

No 153.

IN a process at the instance of Janet Stark and her husband against George Jolly, the LORDS found the defender's intromission with L. 7: 10s. Scots being so small a sum, and but one single act, not relevant to infer vitious intromission.

Forbes, p. 649.

1724. *July 9.*

MR ZACHARIAS GEMMIL, and Others, *against* ROBERT BARCLAY.

No 154.

A person granted a disposition of his moveables to his wife, in which two stacks of oats and one of hay were omitted. His son, upon his

CHARLES BARCLAY of Busbie, the defender's father, granted a disposition of his moveables to his wife, in which only two stacks of oats and one of hay were omitted. The defender, upon his father's death, sold one of the stacks, and granted his receipt for L. 28: 4s. Scots, as part of the price, and applied the same to the payment of the funeral charges; upon which Mr Gemmil, and others of the father's creditors, insisted against him as a vitious intromitter.

It was *pleaded* in defence, That for so small an intromission he could not be overtaken on this passive title, especially when it appeared from the application of the sum received, that he had no intention to defraud his father's creditors. In support of this defence, the decision, Reoch against Cowan, No 150. p. 9828, and Stark and Tam against Jolly, *supra*, were adduced.

It was *answered* for the creditors, That (as my Lord Stair observes) although intromission by strangers, who have not so easy access to embezzle defunct's moveables, must be *per quasi universitatem*, yet a very small intromission should be sustained against an apparent heir, who may huddle up his intromissions, and in time ascribe them to singular titles, &c. B. 3. T. 6. § 3. That there was no necessity of instructing fraud in such an intromission, but the bare contraction of moveables by the heir was sufficient; and if intromission to the value of L. 28 should not subject him as well as a thousand, then no rule could be fixed. As to the decisions it was *answered*, That they were with respect to the uplifting of small sums due to a defunct, where the danger was not near so great, because the debt would remain due if uplifted without a title, and likewise a legal evidence might be had against the intromitter, viz. his discharge to the debtor; whereas the *ipsa corpora* of moveables may be easily embezzled, and no vestige remain.

Replied, That as this passive title was not designed for a snare, the intention and *animus* of the party was to be observed, rather than the fact; and it could not be supposed, that in the present case the heir, by selling of a stack of corn, designed either to defraud the creditors or enrich himself; and as my Lord Stair says, B. 3. T. 9. § 7. 'Intromission with one thing, or a small thing, will not infer this passive title.'

"THE LORDS found the intromission being with one particular of small value, not relevant to subject the defender to the passive title of vitious intromission."

Reporter, Lord Newball.
Akt. Pat. Leith.

Act. And. Macdowal & H. Dalrymple jun.
Clerk, Dalrymple.

Fol. Dic. v. 4. p. 46. Edgar, p. 75.

No 154.
father's death,
sold one of
the stacks for
£81. 4s. Scots,
and and applied the same
to the payment of the
funeral charges. The
Lords found the intromission not relevant to subject the defender to the passive title of vitious intromission.

1739. January 26.

BLACK against WALLACE and KINGS.

No 155.

MARY WALLACE being due the sum of 1000 merks by bond, a process for payment was brought after her decease against Elizabeth Wallace her sister, and John and Mary Kings, her children, concluding upon the passive title vitious intromission. The LORDS found it only proved against Elizabeth Wallace, That she had some small moveables in her custody for the behoof of John and Mary Kings, which had been in the possession of Mary Wallace preceding her decease, and that she delivered these moveables to John and Mary Kings upon their receipt; and found such custody and delivery not relevant to infer the

No 155.

passive title of vitious intromission against the said Elizabeth Wallace ; and found it proved, That the defenders John and Mary Kings did receive from the said Elizabeth Wallace some of their mother's body clothes, a five guinea piece of gold, and four small pieces, in value 23 shillings, and some household furniture, that had been in the possession of their mother before her decease, for which they granted receipts in process to the said Elizabeth Wallace ; but in respect of the small value of these particulars, and that special receipts were granted for them, and of the uncertainty whether the articles of household plenishing did truly belong to Mary Wallace the mother, or to Mr John King her husband, and had only remained in her custody after the husband's death without title ; and that by the proof it appeared, that the bulk of the effects of Mary Wallace had been roused by John Wallace her brother ; found, That John and Mary Kings their intromission with the small particulars contained in the receipts, could not, in law, be construed an intromission *per universitatem*, and therefore not relevant to infer the penal passive title of vitious intromission against them.

Fol. Dic. v. 2. p. 41.

1756. March 9.

No 156.

Creditors who consented to the relict's intromission with the goods of a defunct, after they had been sequestrated by the Commissary court, and received payment of their debts from the relict, were found liable to the other creditors *in valore* of their intromissions.

WILLIAM CUMMING, and Others, *against* ARCHIBALD HART, and Others.

ALEXANDER LAW died suddenly and insolvent. Hart, a creditor, immediately upon his death, preferred a petition to the Commissaries of Edinburgh, setting forth, ' That Law had died suddenly ; that he owed considerable sums to Hart the petitioner ; that there was reason to suspect that his effects might be embezzled, in defraud of him and the other creditors ; therefore praying warrant to sequester and seal up the defunct's effects for the behoof of all concerned.'

The Commissaries granted the desire of this petition. The goods were inspected, and the warehouse locked up by Smith, an officer of court. Next day Smith inventoried and valued the goods, and took custody of the key.

A few days after, the defunct's relict granted her obligation, with two cautioners, to Hart and the other defenders, that she should rouse the effects which had been sequestrated, and apply the price towards their payment ; and this obligation, with an inventory, of the goods, was delivered to John Watson doer for the defenders. Watson informed Smith, that the creditors had come to an agreement with the relict, and thereupon got the keys of the warehouse from him and delivered them to the relict. She roused the goods, and with the price paid off the defenders.

Cumming and other creditors, not parties to this transaction, pursued Hart and others for payment of their debts, upon the passive title of vitious intromission.

Pleaded for the defenders; Vicious intromission is penal and odious; it may not be intended against those who acted *bona fide* and openly; and the defenders did not secretly take possession of their debtor's goods, but took payment from the relict of their just debt, being prevailed upon by her to save to her and her family the expense of confirmation, &c. as there would be a reversion. The whole transaction with her were openly and fairly carried on; neither she nor they imagining there was any other creditors, and the roup was public. Although Hart applied for sequestration; and obtained it for the behoof of all concerned, yet there was no obligation upon him to go further; he might honestly stop here, and take payment of his debt when offered; and the relict is the intromitter, not the defenders.

Answered for the pursuers; The whole was a fraudulent contrivance to hinder a confirmation, and prevent all the creditors from coming in *pari passu*. The defunct's bankruptcy was notorious, as is evident from the words of Hart's application to the Commissaries. If the effects had been fairly divided, there would have been a great deficiency. To prevent this, the name of the relict is used, as she had nothing to lose; but the defenders, and their doer Watson, were the conductors of the whole. They, by the transaction with her, authorised her intromission, and by false representations, obtained the possession of the goods from Smith, thereby taking the goods out of the custody of the Court; a step highly irregular, as done both in contempt of the Court, and to defraud the pursuers.

The Court seemed to be of opinion, that there was no place for a passive title in this case; at the same time that the intromitting with the goods *sine titulo*, after they were in the hands of the Commissaries, and thereby defeating the legal sequestration, was highly irregular; as was likewise the taking such obligation from the relict, and receiving payment from her, all within the six months; that they ought therefore to be subjected *in valorem*.

"THE LORDS found the defenders liable to the pursuers for the debts pursued for, being within the value of their intromissions."

Act. Lockbars.

Alt. Advocatus, A. Pringle.

Clerk, Kirkpatrick.

W. S.

Fol. Dic. v. 4. p. 47. Fac. Col. No 200. p. 298.

1772. June 19.

JAMES WILSON against JANET SMITH, and ROBERT ARMOUR her Husband.

WILSON sued the defenders, as representing his debtor Patrick Smith, father of Janet, insisting chiefly on the ground of vicious intromission with the defunct's moveables. In defence, it was stated, that, upon the death of Patrick Smith, Armour, his son-in-law, having engaged for his funeral charges, he, in virtue of a warrant obtained from the Bailies of Kilmarnock to that effect, sold, by roup, as much of the household furniture as defrayed the expense of the fu-

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No 157.

Intromission with a defunct's effects, where there was no fraud, and the articles inconsiderable, found not to subject farther than *in valorem*.

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neral, with a small balance over, which he intended to have lodged in the hands of the clerk of Court; but that a process having been raised against his wife and him, at the instance of another creditor of the defunct's, they were decerned in payment of the balance of the said roup'd effects: And the said warrant, issued on the defender's application, the inventory of the defunct's moveables, account of his funeral charges, and the process before mentioned, were produced.

The pursuer *alleged* there was private super-intromission in this case, and exhibited a condescendence of the effects which belonged to Patrick Smith, and were intromitted with by Armour, over and above those in the roup-roll produced. Armour admitted, that certain articles had come into his hands; but which, excepting one trifling article of chairs, were some mean body clothes, and some old blankets, &c. he had received from the widow of Patrick Smith, and understood to be at her disposal; and a proof, which the pursuer insisted for in support of his condescendence, being taken, this interlocutor was pronounced by the Lord Ordinary; "Finds the intromission with the defunct's body-clothes and chest proved is too inconsiderable to subject the defender *passive* in payment of the defunct's debts; and, therefore, assoilzies the defender from the penal passive titles insisted on by the pursuer; and finds he can only be subjected *in valorem* of his intromissions."

Pleaded by the pursuer, in a reclaiming petition; The doctrine of the passive title of vitious intromission is explained by Stair, B. 3. Tit. 9. § 1. 2. and 3.; Bankton, B. 3. tit. 9. § 1.; M'Kenzie, B. 3. Tit. 9. § 23.; Craig, lib. 2. dieg. 17. § 3. and 16.

These texts make no mention of a greater or lesser degree of vitious intromission, but are conceived in the most general terms. General principles, when good, must be strictly maintained. The passive title inferred from vitious intromission, which is to be considered as a penal sanction, to preserve the effects of a defunct debtor from being embezzled by those having access to his house and repositories, must not be relaxed, otherwise intromitters would flatter themselves that they might go so artfully to work as to have a chance that only intromissions of a small value would be detected, and so they would escape; nor ought it to avail such, that they have only taken, or been discovered to have taken, things of small value.

The former practice of the Court is also consonant to the pursuer's plea; March 20th 1624, Cochrane, No 146. p. 9825.; July 14th 1626, Johnston, No 16. p. 9659.; January 17th 1627, Fraser, No 18. p. 9661.; July 12th 1628, L. Morrieston, No 173. p. 9853.; February 14th 1629, Steven, No 19. p. 9663.; January 15th 1630, Cleghorn, No 21. p. 9664.; January 25th 1632, Scarlet*; January 12th 1633, ——— *contra* Bruce, No 148. p. 9827.; February 5th 1636, Mowat, No 149. p. 9827.; June 15th 1675, Abercainey, No 151. p. 9828.; November 29th 1679, Irving, *voce* QUALIFIED OATH; February 17th 1697, Marquis of Tweeddale, No 172. p. 9852.; June 29th 1795, Archi-

* Scarlet against Paterson, Durie, p. 614. in the Appendix to this Title.

bald, No 152. p. 9829.; June 24th 1699, Duff, (see APPENDIX.); and decisions of the English Judges, 1658, Hay, see APPENDIX.

But, *separatim*, supposing this novel idea were to be adopted, that intromission with things of small value ought not to infer the passive title of vitious intromission, a due consideration ought to be had to the station and circumstances of parties; for there is no doubt, that what may be considered things of small value, in the case of people of high rank, ought not to be looked upon in that light in the case of mechanics, and others in such circumstances as the deceased Patrick Smith; at the same time, it would appear, that here the defenders, besides what is mentioned in the interlocutor, had laid hold of every thing they could; and a recent instance will be remembered in the case of *Telfer contra Milmyne*, December 2d 1769, see APPENDIX.

Answered; The authorities cited do clearly show, *imo*, That, from the earliest mention of the passive titles in our law, and even during the period when they were most in vogue, that it was a question *in arbitrio judicis*, whether the penal passive titles were incurred or not? and that, in discussing this question, the *animus*, or intention, and extent the of the intromission, were the governing rule; and, indeed, this is founded in the nature of the thing, as, in order to constitute a delict of any kind, an *animus delinquendi* must concur; and this, again, must be judged of from the circumstances of the case. *2do*, These authorities do further prove, that the Court has gradually departed from the severity of our ancient practice with regard to questions of this nature, and the reason, as well as the progress of it, is traced in a masterly manner in *Hist. Law Tracts*, v. 1. p. 73.

Passive titles, in general, and that of vitious intromission, in particular, being introduced as a check to fraud, and the penalty of vitious intromission being so great, every equitable and favourable circumstance tending to exclude the presumption of fraud, is pleadable by the party, and will enter into the consideration of the Judge. Where, indeed, there is ground to presume fraudulent intention of the intromitter, *e. g.* from the universality of his intromission, or other unfavourable circumstances attending it, there the sanction of the law will be applied; and, on the other hand, where the presumption of fraud is taken off by any favourable circumstances, for instance, the smallness of the intromission, and, where the intromission itself cannot be ascribed to any tortious or fraudulent design, then it will not fall within the rule, nor the reason of introducing this penal passive title; and so the doctrine is laid down by Erskine, B. 3. tit. 9. § 53. who mentions, in particular, a decision 22d January 1713, Stark, No 153. p. 9831. where vitious intromission was excluded by the small value of the thing intromitted with.

It does not appear that any attempt had been made to stretch or extend the penal passive title of vitious intromission beyond its just limits, from the date of the last quoted decision, till the case *Black contra Wallace and Kings*, January 26th 1739, cited in Dictionary, No 155. p. 9831. and the judgment there giv-

No 157.

en tends, in the strongest manner, to support the defender's general proposition. " It was found, that John and Mary Kings, their intromissions with small particulars contained in the receipts, could not, in law, be construed an intromission *per universitatem*, and, therefore, not relevant to infer the penal passive title of vitious intromission against them."

Had the defender, upon Patrick Smith's death, entered, *per aversionem*, into the possession of the defunct's moveables, there might have been some more ground for the pursuer's plea of subjecting him, as a vitious intromitter, whether the amount of them were considerable or not, as, in that case, a *malus animus* may be presumeable. But his conduct was the reverse. He acted by legal authority previously obtained. The trifling body-clothes, &c. he understood as given him in a gift by the widow; and he is ready to account for the value of another trifling moveable, mentioned in the proof, which he took into his possession *custodia causa*. And, if the defenders are not misinformed with regard to the case of Telfer *contra* Milnmyne, it was materially different from the present. There were there not only an intromission *per universitatem*, a failure of proving the defence that the intromission was by the approbation and consent of the pursuers, but, moreover, various strong circumstances militating against the defender. On the other hand, the defenders must look upon the decision in the case of Black, as exceedingly favourable to their side of the question. The smallness of the intromission, joined to there being no appearance of fraud, seem to have been the capital grounds of that decision, as they do likewise concur to support that which hath been given in the present case.

" THE LORDS adhered; and afterwards refused a reclaiming petition, without answers."

Act. J. Boswell.

Alt. W. Wallace.

Clerk, Pringle.

Fol. Dic. v. 4. p. 46. Fac. Col. No 16. p. 41.

1775. December 15.

GEORGE PENMAN and JANET BROWN *against* JAMES PENMAN.

No 158.

Action transmits against heirs in *valorem* only.

THE present action was brought against James Penman for payment of a bond for 800 merks, granted by the deceased William Mitchell and Katharine Penman, to which the pursuers have right by assignation.

The defender admitted, that he represents Katharine Penman, in so far as, about five years ago, he made up a title to her, as heir to her at law, by a precept of *clare constat*, in a trifling heritable subject belonging to her.

In the course of this process, a proof was, before answer, allowed, that Katharine Penman represented her husband William Mitchell. A proof was accordingly led; and the Judges were generally of opinion, that it appeared

from thence, she had had an universal intromission with her husband's effects, who was the debtor in the bond sued on; but this being in a question with her heir, who, it was urged, could not be made liable universally, on account of the predecessor's delict;

No 158.

"THE LORDS found the defender liable *in valorem* of Katharine Penman's intromissions only."

Alt. Gen. Fergusson.

Act. Gen. Clerk,

Clerk, Tail.

Fol. Dic. v. 4. p. 48. Fac. Col. No 206. p. 152.

1783. July 10.

GEORGE TAWSE against WILLIAM FINDLATER and WILLIAM MURRAY.

No 159.

A supercargo having died on his voyage home, the owners took possession of what money he had about him, without any legal authority. They were not found liable universally, but were not allowed to retain an account of their own claims.

FINDLATER and Murray appointed Alexander Cheyne their supercargo in a voyage from Peterhead to Bergen, he being to receive, as his reward, a certain share of the profits of the adventure.

Cheyne happened to die on his return, when he had almost reached the land; and on his body's being carried ashore, Findlater and Murray, apprehensive, as it should seem, of suffering loss through his conduct in the business, besides laying hold of the cargo homeward bound, intromitted with his personal effects, particularly the money in his pockets, without having taken any legal step for authorising them so to do.

Afterwards, Tawse, a creditor of Cheyne's, but who had not expedited confirmation, pursued them as vitious-intromitters.

Pleaded for the defenders, The *bona fides* with which they acted must not only exempt them from the character and penal consequences of vitious intromission, but entitles them to retention of the sums in their hands for payment of the debts due to them by the defunct. On the other hand, the pursuer, not having made up a title by confirmation, has no right at all to insist in the action.

Answered, By their intromission, the defenders have subjected themselves to an universal passive representation of the deceased, and are therefore sued as personally liable for his debts: So that it is not the object of the pursuer to attach the moveables of the deceased as *in bonis defuncti*, in which case alone confirmation could have been of any use.

The general opinion of the Court was, That though there was no ground for subjecting the defenders universally as vitious intromitters, yet that they so far stood in that light as to authorise the present action to the amount of the effects intromitted with.

Accordingly, the LORDS found the defenders liable to that extent.

Lord Ordinary, Braxfield.

Act. Rolland.

Alt. Maconochie.

Clerk, Orme.

S.

Fac. Col. No 103. p. 176.

No 160.

A party had intromitted with a watch, a gun, and some other inconsiderable articles, along with a few pounds of arrears of salary, belonging to his deceased brother, and on that account was found liable on the passive title of vitious intromission.

1795. March 7.

RITCHIE against BOWES.

IN 1788, Margaret Ritchie obtained a decree against Thomas Bowes, excise-officer, for payment of L. 4 Sterling yearly, as the aliment of a bastard which she had to him in 1787, until the child should be twelve years of age.

Thomas Bowes having died, she brought an action against his brother, Alexander Bowes, supervisor of excise, concluding for L. 10 Sterling, as arrears of aliment due to her on the 7th March 1793, and for payment of it in future.

Alexander Bowes stated in defence, that he did not represent his brother; and the pursuer was allowed a proof of his having incurred a passive title, by vitiously intromitting with his effects.

Thomas Bowes (it appeared from the proof,) about six years before his death, was stationed at Torbolton, where he furnished a small house, for which he paid L. 2 : 17 : 5 yearly. From Torbolton, he went to Glasgow, where he hired a furnished room; and having consequently no use for furniture, he sent to his father's house in Kilmarnock the following articles, viz. seven chairs, a tent-bed, and a table, the value of the whole amounting to L. 5 : 15 : 6. From Glasgow he was sent to Paisley, where also he had a furnished room. He died there in February 1799; at his death, his property consisted of some clothes, a chest, a silver watch, a gun, a pair of pistols, and a fiddle, together with arrears of salary, amounting to L. 5 : 13s, which the defender afterwards received, upon his receipt, from the collector of the district. A sister of the deceased, who attended him in his illness, brought his corps to Kilmarnock in a coach, at the desire, (as there was reason to believe) of the defender, and also, at her own hand, carried along with her some of the effects above enumerated. A few days after the funeral she returned to Paisley along with the defender, when they packed up the remainder of them. What became of them afterwards the witnesses did not know. The defender, before he left Paisley, paid the medical people who attended his brother, what he owed for his lodgings, and some other small debts, which in all, including the hire of the coach, and other funeral expenses, amounted to L. 18 : 18 : 4. At Whitsunday 1793, the father left Kilmarnock, and came to reside in family with the defender at Dunfermline, and brought along with him the furniture which had belonged to his deceased son.

Such being the amount of the evidence, the defender *contended*, That he had not incurred a passive title: That it was the constant custom of the Excise to pay the arrears of salary due to their deceased officers to their nearest relation, without requiring any title in him, merely upon his shewing evidence that he had paid the funeral charges: That it was his sister, not he, who got possession of, and carried to her father's house, the trifling effects which belonged to his brother at his death; and that although he was present when part of them were packed up, yet having immediately after set out for Edinburgh, he never enquired more after them, but took it for granted that his sister carried them to her father's house, as she had done the former parcel:

That with his brother's furniture he never had any concern ; it had been sent by him to his father *custodiæ causa*, who could therefore be liable for it only *in valorem*. And, lastly, that although he had taken possession of all his brother's effects, he would not have incurred a passive title, as he had never heard of the present claim against his brother till called in this action : That in the whole of his conduct, there was not the smallest appearance of fraud : That the effects themselves were of little value ; and that he had already paid debts of his brother, which would have more than exhausted their price, if they had been exposed to sale.

The general arguments used on both sides, respecting the nature of vitious intromission, were in substance the same with those stated in the case of Wilson and Smith against Armour, No 157. p. 9833. where also the whole authorities referred to will be found.

The LORD ORDINARY assolizied the defender.

On advising a reclaiming petition and answers, several of the Judges were for adhering to the interlocutor, partly because they thought there was no evidence of the defender having intromitted with any part of his brother's effects, except his arrears of salary, in doing which he was justified by the practice of the Excise, and partly because it was clear that he had already *bona fide* paid debts to a larger amount than the whole value of the property left by his brother.

A majority of the Court, however, were for altering the interlocutor. If the passive title of vitious intromission still exist in our law, (it was observed,) the defender has incurred it. The practice of the Excise, to pay, without a title, cannot affect the general rules of law. Independently of this, however, all his brother's effects have ultimately landed in the defender's house, as his father and sister now reside with him ; and they acted under his eye, and with his permission, in taking away what they received. It appears also, that he had interfered with a part at least of these effects, before they were carried away, yet he did not so much as cause an inventory of them to be made. His brother must also, at his death, have had some ready money, though probably not much ; of this, however, no account has been given. The defender, besides, took the whole charge of settling his affairs. He also ordered a coach burial, which was improper, unless he meant to give out of his own pocket what money should be necessary to pay his brother's debts, in so far as his own funds were insufficient for that purpose. In short, he had a general intromission and management, without the ceremony of a title, and therefore must be presumed to have had an *animus* of representing.

The Court, (28th January 1795,) " found the defender, as intromitter with the effects of his deceased brother, liable in the debt due to the pursuer, with the expense of process."

And on advising a reclaiming petition, with answers, the LORDS " adhered."

Lord Ordinary, *Dunsinnan*.

Act. *Honyman*.

Alt. *Fletcher*.

Clerk, *Gordon*.

R. D.

Fol. Dic. v. 4. p. 47. Fac. Col. No 166. p. 397..

1802. December 9.

GARDENER and Others *against* DAVIDSON and Others.

No 161.

Circumstances in which intromission did not infer a passive title.

JAMES PEARSON, merchant in Dumblain, died upon the 20th March 1796, leaving a widow and four daughters, the eldest of whom only had attained majority. John Drummond, Pearson's nephew, and John Davidson, writer in Auchterarder, his wife's brother, sealed up his repositories, and were present along with his family when they were afterwards examined. Various bills were found, some of which were discounted during the month of April 1796.

Upon the 26th of May following, Jean Pearson, the eldest daughter, was decerned executrix as nearest of kin; and soon after, a factory was granted by the widow and children to Drummond.

Pearson had been generally understood to have been in opulent circumstances. Besides possessing some heritable subjects, upon which his wife was secured for a jointure, he was proprietor of four shares of the stock of the Perth Banking Company, and of the same number of shares in the Bank at Stirling. His executrix obtained confirmation of the shares of the stock of the Perth Bank, but the shares of the stock of the Stirling Bank were drawn out without any confirmation, and the discharge was granted by the widow and children, together with Davidson and Drummond the factor.

During the course of the year 1796, various payments were made out of the funds of the deceased, while the affairs were entirely managed by Davidson and Drummond, with the approbation of the family. In the course of the spring of 1797, a state of accounts was made out, by which, for the first time, it was discovered that there was a deficiency for payment of the debts. Upon this, a general meeting of the creditors was called, to determine what measures should be adopted, when Davidson offered, upon the part of the family, to submit the whole of Pearson's funds to the direction of his creditors.

The proposal, however, was not accepted, and an action was raised, in which the widow, the children, Davidson and Drummond, were summoned as defenders. It concluded, *first*, That the defenders, conjunctly and severally, should be found liable, as vitious intromitters with Pearson's effects, for payment of his whole debts; or, *2dly*, That they should at least be found liable for such a share of the debts as the creditors would have drawn from the effects of Pearson, as they stood at the time of his death: And afterwards a supplementary conclusion was introduced, by an amendment of the libel, for subjecting the children of Pearson on the passive title of *gestio pro haredede*.

The Lord Ordinary (2d February 1802) found, "That there were no sufficient grounds for subjecting the defenders as vitious intromitters, or for subjecting them in the passive title of *gestio pro haredede*: But, before further answer, appoints parties procurators to be ready to debate upon the question, How far the defenders, although not liable universally upon the foresaid passive

titles, are not bound, in consequence of their incautious proceedings, to repair the loss thereby occasioned to the creditors, and to replace matters in the same situation in which they stood at the death of the late James Pearson?" His Lordship afterwards superseded the consideration of the question reserved in his interlocutor, until the pursuers obtained a decision of the Court upon the general ground of the passive titles.

The pursuers accordingly reclaimed ; and

Pleaded ; 1st, That the defenders, who had intromitted with the effects of Pearson, were liable, as vitious intromitters ; and, *2dly*, That the heirs-portioners, more especially the eldest daughter, were liable in the passive title of *gestio pro barede*.

The general object of our law, in instituting the passive title of vitious intromission, is, to prevent the moveable effects of a debtor from being abstracted from his creditors after his decease ; and this security is obtained by subjecting those who intermeddle with the moveables of a defunct, without inventory or confirmation, in payment of the whole of his debts.

Vituous intromission may be considered as applying either to the nearest of kin, or to persons who have no right to the succession. If the former take possession of the effects, they commit no crime, because they are perfectly entitled to do so ; but then they become liable for all the debts of the deceased, and are bound to pay them whatever may be their amount. This is the natural course of law, which considers the heir as *eadem persona cum defuncto*. At the same time, certain legal proceedings are provided, which an heir may adopt, who wishes to avoid this responsibility. He may have himself decerned executor ; and after giving up an inventory of the effects to be confirmed by the Commissaries, upon finding caution, he may make use of these effects with perfect security, as he is not liable beyond this inventory ; and at the same time, every person who has a claim upon the inheritance, is secure that no part of the succession shall be secreted or squandered. An heir who is not liable for his ancestor's debts, must be considered as an exception from the general rule, and he can only have the benefit of that exception, by faithfully following out the course marked by law, for the security of creditors.

The case of intromitters, who have no right to the succession, is less favourable than that of heirs. They have no title to interfere with the effects of the deceased at all ; and if they open his repositories without legal authority, and carry off his papers, they assume a character which does not belong to them ; they place themselves in a situation where they may commit fraud with impunity ; and therefore the law provides, that they shall be equally responsible to creditors who have an onerous claim on the succession as the heir himself, who has a legal title. In applying the law on this subject, the question is not, Whether the person acted with bad intentions. It is enough, that he knowingly took possession of the effects of the deceased, without adopting those steps

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which are pointed out for the security of all concerned ; Craig, L. ii. t. 17. § 5. ; Ritchie against Bowes, March 7. 1795, No 161. p. 9840.

Partial confirmation is no defence against the passive title, when the vitious intromission greatly exceeds the value of the subjects confirmed. The duty of an executor is to give up a full inventory of the effects, so far as is consistent with his knowledge ; and if he has intromitted with effects without confirming them, he incurs the same responsibility as any other vitious intromitter ; Hope, Min. Pract. tit. 3. § 5. ; Craig, L. 2. t. 17. § 3. ; Stair, b. 3. tit. 9. § 11. ; Kneeland against Baillie, February 13. 1627, No 167. p. 9848. ; Steven against Paterson, February 14. 1629, No 19. p. 9663. ; Irving against Forbes, June 8. 1676, No 5. p. 7722. ; Anderson against Anderson, January 28. 1678, No 170. p. 9851. ; Marquis of Tweeddale against Dempster, Feb. 17. 1697, No 172. p. 9852. ; Drummond against Campbell, Dec. 13. 1709, *voce* SERVICE and CONFIRMATION ; Lawrie against Gordon, July 27. 1779, No 94. p. 3918. ; Fraser against Gibb, 10th Feb. 1784, No 95. p. 3921. The doctrine established by these decisions applies in the strongest manner to the present case, where the intromission was universal, while the inventory and confirmation were trifling, and such as not to afford the smallest security to the creditors of Pearson.

2dly, With respect to the passive title of *gestio pro herede*, the pursuers pleaded, That the daughters of Pearson had taken possession of his heritable subjects, without being served heirs-portioners to their father ; that, they had levied the rents, and granted a factory to Drummond, giving him a commission to intromit with the heritable subjects. Such a conduct is exactly that which the law has described as sufficient to incur a passive title ; Erskine, 8vo, b. 3. tit. 8. § 38.

Answered ; The argument maintained by the pursuers, resolves itself into an attempt to revive doctrines with respect to passive titles which have been long obsolete. In early times, when the utmost strictness was requisite to prevent individuals from plundering the property of their neighbours, he who interfered irregularly with the moveables of a person deceased, was held liable for all his debts without limitation. But this regulation has been gradually mitigated, and is not now enforced, unless there be some appearance of fraud ; Bankton, v. 2. p. 421.

It does not appear, even in the most rigid period of our practice, that the defenders, Davidson and Drummond, could have been found liable. The former merely gave advice and assistance to his sister with respect to the affairs of her family, without ever obtaining possession of any of the funds, or intromitting in any way with the estate ; and Drummond acted in all his intromissions under an express authority from the executrix of the deceased, whom he was entitled to regard as having a right to the property. He cannot therefore be found liable upon a passive title ; Stair, b. 1. tit. 9. § 8. ; Tennant against Tennant, July 28. 1626, Durie, No 192. p. 9866.

The mere fact of super-intromission, was never understood to make an executor universally liable. The original practice with respect to the *aditio in mobilibus*, was for the executor decerned, upon obtaining confirmation, to give up an inventory of the whole moveable estate of the deceased on oath, in so far as it consisted with his knowledge; Craig, b. 2. t. 17. § 2. If there were any defect in this inventory, it was incumbent upon the executor to show that the omission was innocent; and it was only when this could not be shown, that, even in the earliest periods, the super-intromission subjected him in an universal passive title; Scot against Livingston, December 5. 1623, Durie, No 145. p. 9824.; Reoch against Cowan, February 26. 1668, Stair, No 150. p. 9828.; Douglas against Tours, June 20. 1629, No 168. p. 9849.

But a material change came to be introduced with respect to the confirmation of executors, and the form of exhibiting an inventory was by degrees laid aside; Ersk. b. 3. t. 9. § 33. A partial confirmation became the general practice; and the strict doctrine, which held an executor who did not give a full statement of the whole effects guilty of perjury, was consequently abandoned. Unless fraud be positively established in the conduct of the executor, a partial confirmation has for a long period been understood to protect him from incurring the passive titles; Bank. v. 2. p. 424.; Ersk. b. 3. t. 9. § 53.

2dly, With regard to the passive title of *gestio pro hærede*, it was answered, that the widow was entitled, by her marriage-contract, to an annuity out of the rents of the heritable subjects; and that the fee of this property being provided by the contract of marriage to the children of the marriage, the eldest daughter, as heir portioner of provision, was not liable beyond her intromissions.

But it was, above all, strongly urged upon the part of the defenders, that their conduct was perfectly free from any fraudulent intention; that they believed Pearson's property greatly to exceed the amount of his debts; and that whenever they discovered their mistake, they made over the whole of the effects to the creditors.

The Court, upon advising the petition, with answers, adhered to the interlocutor of the Lord Ordinary.

But great doubts were expressed by some of the Judges in the minority, with respect to the propriety of this decision; and it was even stated from the Bench, in the strongest manner, that if this case were to be followed as a precedent, the doctrine of passive titles might be expunged altogether from our law books.

Lord Ordinary, Cullen.
Alt. W. Erskine.

Act. Campbell junior.
Agent, R. Hill, W. S.

Agent, Ja. Gentle.
Clerk, Gordon.

Fac. Col. No 69. p. 156.

7.

S E C T. II.

Where Possession commenced lawfully, the continuing in Possession will not be Vitious Intromission.

No 162.

1628. *January 16.*ALLAN'S EXECUTORS *against* LANDER.

A HUSBAND after his wife's decease, cannot be convened as vitious intromitter with her goods to pay her debt, being *dominus omnium ejus bonorum*, and continuing only in that possession after her decease which he once as husband had lawfully acquired.

Fol. Dic. v. 2. p. 42. Dwrie. Spottiswood.

* * * This case is No 135. p. 5931. *voce* HUSBAND and WIFE.

* * * A similar decision was pronounced 7th February 1629, Brown against Dalmahoy, No 136. p. 5932. *voce* HUSBAND and WIFE.

No 163.

1674. *June 10.*LADY SPENCERFIELD *against* HAMILTON.

WHEN a person enters to the possession of the defunct's house by a warrant of the Lords, his possession of the goods in the house does not infer vitious intromission, unless he make use of goods, which *usu consumantur*, or dispose of goods that are not of that nature, such as beds, tables, &c.

Fol. Dic. v. 2. p. 42. Dirleton. Stair.

* * * This case is No 97. p. 9762.

No 164.

1676. *December 13.*FAIRHOLM *against* MONTGOMERY.

Vitious intromission found excluded and that there was no claim beyond the value, the intromission being that of a husband continuing to possess his

MR JOHN FAIRHOLM pursues Mr Francis Montgomery for 20,000 merks, due to him by the Earl of Leven, as being vitious intromitter with his Lady's half of the moveables, which he possesseth, and hath not confirmed now by the space of a year and more after her death, which Lady was heir to the Earl of Leven his debtor. The defender *answered*, That a husband continuing to possess his own moveables, can never be vitious intromitter for his wife's share, though he confirm not within the year. *2do*, The defender hath a disposition from his

Lady. It was *replied*, That the disposition was *in lecto*, and imports but a legacy, and cannot exclude creditors.

THE LORDS found the defence relevant to exclude the general passive title of vitious intromission, he confirming before extract, but prejudice to the creditors to insist *quoad valorem*.

The pursuer further insisted upon this title, that the defender is liable for his Lady's debt *jure mariti*, especially seeing it was established by a decret against him in her life. The defender *alleged*, 1^{mo}, That though the marriage were standing, he was not liable for any heritable debt of his wife's *jure mariti*, that being a consequence of the communion of goods betwixt man and wife, which is only in moveables. 2^{do}, Though this debt were moveable, yet it hath no effect against the husband after dissolution of the marriage, though decret was obtained before, as hath been oft-times decided. The pursuer *answered*, That though this debt was heritable by infestment, yet it contains a personal clause for payment; and therefore, according to the common custom, a charge of horning would make it moveable upon this account, that the creditor betakes himself to his personal right: But here there is more, for the creditor could not charge the debtor being dead, but he hath pursued an action for payment, and obtained decret, and never possessed after. 2^{do}, Albeit the dissolution of the marriage frees the husband from that indefinite obligation, to be liable for all his wife's debts, yet he remains still liable *in quantum est lucratum*; for the marriage being a legal assignation to the wife's moveable estate, must import the burden of her debt so far as the moveable estate can reach, and remains unconsumed *per onera matrimonii*, as was found James Cunninghame *contra* Thomas Dalmahoy, No 82. p. 5870. It was *replied*, That though that hath been sometimes sustained, yet it hath never been cleared upon what ground, and how far it is to be extended: But the only just ground can be, that if a wife have debts anterior to the marriage, her posterior marriage cannot defraud her creditors, if she have nothing *aliunde* to pay, if her moveables exceed the just interest of the husband, *ad sustinenda onera matrimonii*; but otherways marriage is always interpreted a cause onerous, and in this case the Countess hath a plenteous real estate befalling to her heir.

This point the LORDS decided not, but resolved to hear it in their own presence, for clearing the extent of that title.

Stair, v. 2. p. 477.

* * * Gosford reports this case:

THE Lord Melville assignee, constitute by John Fairholm of Craigshall, in and to a bond granted by the deceased Countess of Leven, for the sum of 20,000 marks, whereupon he was infest in an annual rent out of her estate, and whereupon he had obtained a decret against the Countess and Mr Francis Montgomery, then her husband *pro interesse*, and thereupon had denounced them to the horn;

No 164.
wife's share
of moveables
unconfirmed
for year and
day, he hav-
ing a disposi-
tion to the
moveables *in
lecto*.

No 164.

did intent action against Mr Francis after dissolution of the marriage for payment of the said debt upon these grounds ; 1^{mo}, That he was liable, because he was *locupletior factus* by the marriage, having intromitted with the rent of the estate during the marriage ; 2^{do}, That he was liable *jure mariti* to his Lady's debt ; upon which ground they cited a practick, The Laird of Cunninghamhead against Thomas Dalmahoy, No 82. p. 5870. ; whereupon he was found liable to the Duchess of Hamilton's debt *jure mariti*, as being *locupletior factus* after dissolution of the marriage. It was answered, That the Lord Melville could not pursue as assignee, because the time of the assignation he was tutor to the deceased Countess, and having meddled with her estate before and since the dissolution, albeit the tutory was now ceased, yet *ante redditas rationes*, the law presumes, that any assignation he purchased to his pupils bond was acquired by her means and not by his own ; and until the end of the count and reckoning, this title of assignation could not be sustained, the pupil being only debtor ; and that he could not be liable as *locupletior factus* by the marriage, because any provision he had by the contract was but a just and competent remuneration, he having married the heritrix, and having renounced the right of the courtesy of Scotland, whereby the rents of the whole lands would have fallen to him in case there had been an heir of the marriage : Likeas, he did advance of his own means, the sum of 50,000 merks, which was applied for the payment of the debts of the family, and whereof he hath no repetition, albeit there be no heirs of the marriage, and in consideration thereof, all that he gets is but a naked liferent of a part of the lands, the rest being burdened with the creditors' debt ; so that by our law, the provision for so just and onerous a cause cannot be reduced by creditors upon the act of Parliament 1621, albeit they were insisting for a reduction upon that head. Likeas by a practick, The Earl of Northesk against the Lady Craig, for additional jointure besides what was provided by the contract of marriage, being offered to be reduced upon the said act by a lawful creditor, she was assoilzied upon this ground, that there was more than a sufficient estate to pay creditors of all their debts, and that therefore, she should enjoy her liferent until the rest of the estate was discuss ; and provisions made by husbands and wives could not be quarrelled but by subsidiary actions, in case the heir or executor were not found, after discussing, to have heritage or moveable estate sufficient to pay creditors. Likeas, that any intromission with the moveables could not make the husband liable because he had right thereto *jure mariti*, which was an assignation in law ; neither could the pursuer's title be sustained, unless he were executor creditor confirmed, which title is not yet settled in his person ; and if it were needful, the defender could instruct that he hath paid as much debt as the moveables could amount to. THE LORDS having seriously considered this case, and the whole titles whereupon the pursuit was founded, with the answers made thereto, as to the first, They found that the assignation being *stante tutela ante redditas rationes*, the tutor could not pursue till it might appear whether the assignation

was purchased by the pupils means or his own; neither did they find, that after dissolution of the marriage, the decret and horning executed against him *pro interesse*, only could make him liable, seeing in a former process Craigshall when the right was in his person, had executed the horning in his name, but had judicially declared that it was against his knowledge and warrant that it was executed against the husband, so that the marriage being now dissolved, the Countess's heirs were only liable; and for that title that he was *locupletior factus*, there being no reduction upon that head, they did assoilzie in this process, but reserved it as accords, as likewise how far he might be liable as intromitter with the moveables of the pursuer, or had a title as executor creditor.

Gosford, MS. No 915. p. 592..

No 164.

1680. June 9. BROWN against The EARL of Lothian.

WILLIAM BROWN pursues the Earl of Lothian as vitious intromitter with his father's moveables, for payment of a debt of his father's, contracted after the disposition of the estate of Lothian to him, and condescends that the Earl intromitted with the instruments of the coal-work, and with the tiends of the feuers of Newbottle.—The defender *answered* to the first, That his father having disposed to him the estate, with coal and coal-heughs, with reservation of his own liferent, the property of the coal-heughs carries therewith the necessary instruments of the coals, though not expressed; and his father having disposed his liferent right to Sir Patrick Murray, he possessed till his father's death; after which the defender continued to uplift the profit of the coal, the servants of the coal remaining the same, and retaining the instruments of the coal-work; and denies any other intromission; so that though the instruments of the coal-work could be questioned, as not carried by the disposition of the coal-heugh, yet the servants continuing to work with the same instruments, could never infer a vitious passive title against the Earl, albeit executors might have recovered the instruments from the work-men; and as to the tiends, the Earl uplifted a part of the feuers' tiends by virtue of a tolerance from Sir Patrick Murray, to whom the late Earl disposed the feu-duties and tiends of his liferent lands.—The pursuer *replied* to the first, That instruments of a coal-work, not being fixed to the ground, were certainly moveables, and so could not be carried by the disposition of the land and coal-heugh, unless they were expressed, but would belong to executors, and fall in escheat in the same way as steelbow-goods, or the plough and plough-goods upon the mains, which being continued to be made use of by servants, by their master's knowledge and approbation, would infer his vitious intromission; and the Earl could not be ignorant that the servants continued to make use of the instruments which were his father's; and as for the feuers' tiends, they are not disposed by his father to Sir Patrick.

No 165.

It being pleaded, that the fiar of a coal-work did, after the liferenter's death, continue to work by his servants, with the instruments of the coal-work which belonged to the liferenter; this was repelled, it not being properly an intromission, but only a continuation of possession.

No 165.

THE LORDS found, That though the servants in the coal-work continued to make use of the instruments of the coal-work, either fixed or unfixed, this did not infer vitious intromission against the Earl; but did not determine to whom the property of the unfixed instruments did belong, such as picks, buckets, and mattocks, &c.; and found the tolerance from Sir Patrick Murray relevant to liberate from the universal passive title, albeit the disposition had a general clause, dubious whether it would extend to the feuers' teinds or not; seeing a colourable title was sufficient to exclude this universal passive title.

Fol. Dic. v. 2. p. 42. Stair, v. 2. p. 768.

S E C T. III.

Where the executor has been confirmed.—Where the party died at the horn:

No 166.

Super-intromission, subsequent to confirmation, infers only restitution; but, if it is prior, the fraudulent concealment makes the executor liable universally.

1616. February 1.

JOHNSTON against KER.

IN an action pursued by Johnston against Margaret Ker, the LORDS sustained an exception of executors confirmed against the libel of universal intromissatrix; but thereafter, it being *replied*, that the relict was nominate, and had intromitted with certain goods, which were not confirmed *ab initio*, the LORDS repelled the exception, in respect of the reply, notwithstanding it was duplied, that the goods and sums omitted were confirmed in the dative *ad omissa*, and decreet of exoneration given in favours of the executor; and that because the LORDS found, that the relict had intromitted before the confirmation, *dolo fecit* that she did not confirm.

Fol. Dic. v. 2. p. 42. Kerse, MS. fol. 141.

No 167.

Found in conformity with Johnston against Ker, *supra*.

1627. February 13.

KNEELAND against BAILLIE's Relict.

IN an action for registration of a bond, by one Kneeland against the Relict of Baillie, who was maker of the bond, she being convened as intromissatrix with the defunct's goods, the LORDS sustained the action against her as intromissatrix, notwithstanding that she *alleged*, That there was executors confirmed to the defunct long before the intending of this cause; seeing the bairn was confirmed executor, and the testament was given up by herself, and that she made faith, and caused find caution in the testament; and that the particulars which were condescended on to have been intromitted with by the defender,

before the said confirmation, were not given up in testament; which neither being given up, nor eiked since, discovered a fraud upon her part, and so the action was sustained against her *hoc nomine*; and found it not necessary to put the pursuer to take a dative *ad omissa*; also they found, that the said intromission being proven against her, it should import decreet against her as universal intromissatrix, and for payment of the whole debt; and not to that effect alternarily, to make the goods intromitted with furthcoming to the pursuer *pro tanto*, for payment so far as the said goods would amount to; but that, albeit the same could not satisfy the whole debt, yet that she should pay the same as universal intromissatrix, in respect of her foresaid fraudulent omission to give up the same.

Act. —.

Alt. *Sandilands.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 42. Durie, p. 272.*

* * Spottiswood reports this case :

A RELICT being convened as intromissatrix with her husband's goods and gear, *alleged*, No process against her, because she offered to prove that there were executors confirmed before the intenting of the cause. *Replied*, That he ought to have process against her notwithstanding, because he offered him to prove she had intromitted with sundry particulars given in ticket, besides what was given up in testament. *Duplied*, Let him take a dative *ad omissa*; for, as for her intromission, she was countable to the executors.—THE LORDS found process against the relict as universal intromissatrix, *in odium fraudis et perjurii*, in giving up of the inventory.

Spottiswood, (EXECUTORS.) p. 112.

1629. June 20.

DOUGLAS against TOURES.

No 168.

WHEN one is pursued as universal intromitter with any defunct's goods, it is a good exception, that there was an executor confirmed to the defunct before the intenting of the cause; because the executor being a party representing the defunct, all the defunct's creditors have good action against him; but if one confirm himself executor to a defunct as a creditor of his, for payment of his own debts, he is not such a party as action can be had against him for any of the defunct's debts; and therefore such confirmation cannot free an universal intromitter. Yet, in the like case, between Jean Toures and N. Douglas, the LORDS would not sustain action against the defender as universal intromitter, but found that the pursuer should take a dative *ad omissa* by the first executor, who had confirmed himself executor creditor, or yet that he might pursue the intromitter for giving up that wherewith he had intromitted.

Spottiswood, (UNIVERSAL INTROMITTER.) p. 352.

No 168.

** Durie reports this case :

ONE being convened, as universal intromissatrix with her father's goods, to pay a debt owing to the pursuer by her father; and the defender *alleging*, That there was another of the defunct's creditors confirmed executor to him, so that thereby she could not be convened as universal intromissatrix; and the pursuer *replying*, That a creditor confirming himself executor *in aliquo individuo*, only to the effect his own debt might be paid, that could not take away the action competent to another creditor, against the intromitter with other goods, by and attour that which was confirmed, and that he could not have action against the executor:—THE LORDS found, that there being an executor confirmed *ante captam litem*, albeit he was only a creditor, against whom no other creditor could have action in law, yet that thereby no other could be convened as universal intromitter; but that the pursuer might either seek a dative *ad omissa*, or else insist against the defender, as intromitter, to make the particulars, which should be proven to be intromitted with by her, furthcoming to the pursuer, or the prices thereof; for which particulars sentence should only follow against the defender, and for the which the action was sustained; but not to make her liable to the debts as universal intromissatrix, for the which the action was not sustained; and election was given to the pursuer, either to insist against the defender in this same process as intromitter to the effect foresaid, or else to seek a dative *ad omissa*. See SERVICE and CONFIRMATION.

Act. ———.

Alt. Mowat.

Dic. Fol. v. 2. p. 42. Durie, p. 448.

1662. February 7. MARJORY GRAY against DALGARDNO.

No 169.

It is no defence against vicious intromission, that the intromitter died at the horn, because his moveables are still liable to the diligence of his creditors, unless there be a general declarator on the g.f.

MARJORY GRAY pursues Dalgardno, as vicious intromitter with the goods of a defunct, to pay his debt, who *alleged*, Absolvitor, because the defunct died rebel, and at the horn, and so *nihil fuit in bonis defuncti*; seeing, by the rebellion, all his moveables belonged to the fisk, *ipso jure*, without necessity of tradition, for the King, *jure coronæ*, hath the right of lands without infettment, and the right of moveables forfeited, or fallen in escheat, without tradition or possession. The pursuer *answered*, *Non relevat*, because the defender intromitting without any warrant from the fisk, is *quasi prædo*, and moveables are not *ipso facto* in the property of the fisk by the rebellion; but, if they be disposed by the rebel for an onerous cause, the disposition before rebellion will be valid; or, if they be arrested for the defunct's debts, and recovered by sentence, making furthcoming; or, if a creditor confirm himself executor-creditor to the defunct rebel, he will be preferred to the fisk; by all which it appears,

that the rebellion transmits not the property. The defender *answered*, That these instances do only show that the King prefereth creditors, and takes but the benefit of what the rebel had *deductis debitis*, or what was contracted with him *bona fide*, but doth not say, that the property of the goods was not in the fisk, but in the rebel.

THE LORDS repelled the defence. The defender further *alleged*, That not only was the defunct rebel, but that he had a gift of his escheat. The pursuer *answered*, *Non relevat*, unless it had been before the vitious intromission, or at least *ante motum litem*.

THE LORDS repelled the defence, unless the defender would allege that the gift was *ante motum litem*; for they thought, that the taking of the gift was like the confirmation of an executor, which purged vitious intromission, being *ante motum litem*.

1662. February 27.—Marjory Chalmers pursues William Dalgardno, as vitious intromitter with a defunct's goods, to pay his debt, who *alleged*, Absolvitor, because the rebel died at the horn, and so had no goods; *2dly*, The defender hath the gift of his escheat, and also is executor-creditor confirmed to him; *3dly*, The defender had a disposition of all the defunct's goods, albeit he possessed not thereby during his life, yet he might enter in possession after his death, and not be vitious intromitter.

THE LORDS found this defence relevant to elide the passive title, but prejudice to either party to dispute their right as to the simple avail of the goods; and they repelled the first defence, and found the second and third defences relevant only if the gift was before the intenting of this cause.

Fol. Dic. v. 2. p. 42. Stair, v. 1. p. 92. & 109.

1678. January 23. ANDERSON against ANDERSON.

No 170.

If he, as executor to his brother, could deduce a third of the legacies for his pains in executing the office, conform to the act in 1617? *Alleged, imo*, The act speaks of strangers, which he is not; *2do*, It allows deduction from off legitims, but not off legacies, as is clear by Durie.

1678. January 28.—THE LORDS found the defenders having omitted to confirm some moveable sums lying in Holland, which he knew of by the count books, and intromitted therewith, they found it *dolose* omit, and they made him liable for that super-intromission, without putting the pursuer to take a dative *ad omissa*; so that the LORDS inclines to find such super-intromission no less a passive title than vitious intromission.

Fol. Dic. v. 2. p. 43. Fountainhall, MS.

54 T 2

1697. February 2. RAMSAY of Cairnton *against* CARNEGIE of Phineven.

No 171.

Found in conformity with Johnston against Ker, No 166. p. 9848.

CROGERIG reported Ramsay of Cairnton against Carnegie of Phineven, for payment of a debt due to him by Kinfawns, with whose moveables Phineven intromitted. *Alleged*, Any intromission he had was as tutor to his brother's daughter, and who was executrix confirmed *qua* creditrix on her bond of provision to her father, which was sufficient to purge an odious passive title of vitious intromitter. *Answered*, The defence ought to be repelled, because he offered to prove the intromission was prior to the confirmation, and the goods and plenishing so intromitted with were never confirmed, but a sham-confirmation of some other particulars made up; so that here was not only a vitious super-intromission, but likeways a fraudulent omission and concealment, which, by the principles of law and reason, must make him *passive* liable to the whole. *Replied*, Any intromission made prior to the confirmation was necessary; and the new act of Parliament 1696, declaring that the confirmation of an executor-creditor shall not defend another intromitter farther than the subject confirmed, shews it was a total exception before that act.—THE LORDS having considered the tract of decisions, that fraudulent concealment inferred this universal passive title, and that a dative *ad omitta* was only allowed to make them liable *in quantum* the value of their intromission extended, if it was not omitted *dolose*; therefore they found it relevant to make him liable *passive*; especially seeing it was offered to be proven, that he had raised his process, and used citation before the confirmation, though after the decerning him to be executor; though the intervening of a creditor's citation betwixt the two, if there were not a considerable distance of time, or delay in confirming after the obtaining themselves decerned, would not be much regarded; yet here the Lords found Phineven in this case a vitious intromitter. See 13th February 1627, Kneeland *contra* Bailie's Relict, No 167. p. 9848.

Fol. Dic. v. 2. p. 42. Fountainhall, v. 1. p. 762.

1697. February 17.

MARQUIS of TWEEDDALE *against* The RELICT and CHILDREN of ROBERT DEMPSTER, his Chamberlain.

No 172.

Found again in conformity with Johnston against Ker, No 166. p. 9848.

In the Marquis of Tweeddale's pursuit against the Relict and Children of Robert Dempster, his chamberlain, for clearing his accounts; *alleged*, Absolver, because she was executrix confirmed *qua* creditrix upon her contract of marriage. *Answered*, This could not purge the passive title of vitious intromitter, because they offered to prove super-intromission. *Replied*, That could

only make her liable in law to any who should take a dative *ad omnia*, but could not infer an universal passive title.—THE LORDS thought her defence good, if the super-intromission was subsequent to the confirmation; for that would only infer restitution of the value; but, if it was prior, then the fraudulent concealment makes them certainly liable *in solidum*.

Fol. Dic. v. 2. p. 42. Fountainhall, v. 1. p. 767.

No 172.

S E C T. IV.

Any colourable title of intromission found to elide the passive title.

1628. July 12.

CRANSTON of MORESTON *against* The LAIRD of FRENDRAUGHT'S GRANDCHILD.

ALEXANDER CRANSTON of Moreston having paid as cautioner for umquhile Sir James Crichton of Frendraught, 500 merks at Whitsunday 1611, sought his relief of the Laird of Frendraught's grandchild, whom he convened as heir to his father James Crichton of Auchingoul, who was universal intromitter with the goods and gear of Sir James his father, and grand-father to the defender. *Alleged*, He could not be convened to represent his grand-father *ex illo medio*, as heir to him who was universal intromitter with his goods and gear, because Sir James, the time of his decease, had no goods nor gear, in respect he died at the horn, and the gift of his escheat was disposed to Lesmoir, who obtained declarator thereupon, to which gift and declarator Lesmoir had assigned the defender; so that any intromission the defender's father had with Sir James's goods and gear, was as administrator of the law to the defender, to whom the goods belonged by virtue of the gift and assignation foresaid. *Replied*, He could not be heard to purge his father's intromission by that pretended administration, because the gear he intromitted with after Sir James's decease; were either acquired by Sir James after the gift, and so fell not under it, or before, in which case the donatar's suffering the rebel to remain in continual possession for ten or twelve years till his decease, evicts the gift to be simulate and null by the act of Parliament 1592. *Duplied*, As to the first part of the reply, his gift and declarator were of all goods belonging to Sir James the time of the gift, or which he should happen to acquire during the rebellion; and true it is that he died rebel, and unrelaxed from the same horning whereon the gift proceeded. As to the second part of the reply, bearing that retention of possession among conjunct persons renders the gift null by the act of Parliament; *imo*,

No 173.

Found to be vitious intromission, altho' the defender alleged he had intromitted in virtue of a gift of escheat, upon which declarator had followed, because the gift was simulate, the rebel having been allowed to continue in possession until his death, 13 years after the declarator.

No 173. That is where the rebel remaineth in possession of his whole goods, or the most part thereof, but not when the donatar has apprehended possession of the most part, and leaves only a mean quantity thereof for the rebel's maintenance ; *2do*, The act of Parliament maketh the gift null only in favours of a second donatar, but not in favours of a creditor ; for the most that a creditor can seek is to be preferred to the donatar in these goods, to have them made furthcoming to him, but it will never work that effect to make the donatar universal intromitter, if he has meddled therewith ; *3tio*, The pursuer cannot allege retention of possession by the rebel, because it is offered to be proved, that the defender's father as administrator to him, conform to the gift and declarator, apprehended possession of the place of Frendraught, and of all the plenishing within the same and upon the mains thereof, uplifted the mails and duties to the defender's behoof, and that during all the days of Sir James his life, who never received back possession thereof again. *Triplied* to the *first* part, That the gift is extended to goods acquired by the rebel *stante rebellione*, it is only *stilus curiæ*, notwithstanding whereof such gifts are ever restricted to the goods belonging to the rebel the time of the denunciation, or year and day after. Next to that, that in the act of Parliament is meant only where the rebel retains his whole goods in his possession, the pursuer is contrary ; for albeit he had suffered the rebel to keep still any thing of his, never so small, yet after his decease he could not intromit therewith, but with the hazard of undergoing his debts. The Lords repelled the exception, and found that his intromission with any part whatsoever of the rebel's goods after his decease was vitious, notwithstanding of the right he had to the rebel's escheat, in respect he had suffered him to remain in possession thereof all his lifetime.

The same found between John Dalrymple of Waterside and the Laird of Clossburn, *infra*.

Secundo, *Alleged* by Frendraught, His father could not be convened as universal intromitter with Sir James his goods and gear, because he offered to prove, that after Sir James his decease his second son George Crichton intromitted with his whole goods, and transported the same to his own house, where they were in his possession diverse months, till they were roup'd and sold by George ; and any intromission the defender's father had with them, was by buying the same, as others did, from his brother at the prices they were appraised at. *Replied*, This allegiance was contrary to his libel. In respect whereof this allegiance was likewise repelled.

Tertio, *Alleged*, He ought to be assoilzied from the annualrent from the time of the rebel's decease, till the intenting of the summons ; because he was only subject in payment of that which the defunct himself was owing the time of his decease ; for he behoved to be in the same case with an executor, who would not be obliged either for penalty or annualrent, before there was sentence recovered against him. *Replied*, That intromission being vitious, and not war-

rantable by law (as an executor's is) he was answerable to him for all that the principal debtor would be, were he alive. This allegiance was repelled likewise.

No 173.

Fel. Dic.v. 2. p. 43. Spottiswood, (UNIVERSAL INTROMITTERS.) p. 350.

* * Durie's report of this case is No 60. p. 522. *voce* ANNUALRENT:

1632. June 28.

DALRYMPLE of Waterhead *against* L. CLOSEBURN.

DALRYMPLE of Waterhead pursues Closeburn as universal intromitter with his father's goods, to pay his father's debts, who for the particulars condescended on by him, *alleged* the same to have been delivered by his father to the defender's wife, two years before his father's decease, who by virtue thereof was in possession before his father's death; and the pursuer *replying*, upon the father's retention of the same continually in his possession, until the time of his decease, notwithstanding of the alleged disposition or gifting, which behoved to be reputed simulate betwixt father and son, and the son's wife, and to prejudge creditors; and the excipient *duplying*, That no retention of possession could be alleged, to prejudge the anterior delivery made by the father, and to bring on all his father's debts on him, seeing the defender and his wife, after the foresaid delivery, became in actual possession of the same whole goods in the father's lifetime, who two years before he died, had neither estate nor means, whereof he might be reputed possessor, but was all this time sick and infirm, and lay bedfast, and remained in house with his son the defender, who entertained him in his family, the father neither having family nor servants, whereas the family was sustained upon the defender's charges, and he only paid the hires and fees of the servants, the father having no means to do the same, seeing his whole estate was evicted and apprised from him by Bryce Sempill; and the pursuer *triplying*. That the father retained the possession, and entertained the family, and paid the servant's fees, and that the son, who had nothing, remained in the house with his father; likeas the father, during all the days of his lifetime, continued still in possession of his lands and living, notwithstanding of the said comprising;—the exception and duply was repelled, in respect of this reply and triply, which was sustained and admitted to the pursuer's probation; and, upon the 3d of July 1632, the defender *alleging*, That the gift of his father's escheat was disposed to — Kirkpatrick, who had obtained thereupon both general and special declarator, who made the right thereof to the defender, by virtue whereof he intromitted, and so he could not be convened as universal intromitter with his father's goods; and the pursuer *replying* upon the father's retention of his goods all his lifetime, and that the defender after his decease intromitted therewith;—the reply was admitted, and the exception repelled.

No 174.
Found in conformity with the above.

No 174.

July 4.—In the cause of Dalrymple of Waterhead, mentioned June 28 1632, it being *alleged*, That the annualrent of one of the debts, for which the defender was convened, was paid, which he offered to prove by witnesses, and which he alleged was probable by witnesses, seeing the quantity of the said yearly annualrent was but the second part of an hundred merks, which was only the pursuer's part for the whole annualrent, being only an hundred merks yearly, the pursuer had only right to the second part yearly, which was within the sum which was probable by witnesses;—the Lords found, that seeing this annualrent was constituted by writ, and that the party was obliged by writ to pay the same, albeit the quantity yearly belonging to the pursuer was within an hundred merks, and that it was alleged, that it was yearly paid, whereas there were many years pursued for; that therefore the payment could not be proved by witnesses, but only by writ, or oath of party, and no otherways.

Clerk, Hay.

Fol. Dic. v. 2. p. 43. Darie, p. 637. & 639.

1638. December 15.

OGILVIE against —

No 175.

Found again
in conformity with
Moreston a-
gainst Fren-
draught, No
173. p. 9853.

ONE Ogilvie, servitor to Mr John Fletcher advocate, pursuing — as intromitter with his father's goods and gear, for payment of a duty of a tack of the lands of — set to him in tack by —, and which duty was resting unpaid the years libelled by the defender's umquhile father; and the excipient *alleging*, That he could not be convened *boc nomine*, as intromitter with his father's goods, because his father died rebel, and at the horn; likeas, the gift of his escheat was disposed to a donatar, who obtained declarator, and thereafter disposed the right thereof to this defender, by virtue whereof he intromitted, which cannot make him liable to pay his father's debt;—the other *replying*, That that gift cannot prejudice the pursuer, nor defend the excipient, because notwithstanding thereof the defunct remained continually in peaceable possession of all his own goods diverse years unto the time of his decease, at the which time the defender immediately entered, and possessed himself therewith; likeas, he yet bruiks the same lands, set in tack to his father: THE LORDS found this reply relevant *in boc casu*, to make the defender liable for the tack-duty of the years by-past, owing by his father *ad hunc effectum*. The reply was sustained, notwithstanding the defender alleged, he bruicked the tack by virtue of the said escheat, as said is, and that he was content to pay the tack-duty of all the years since his father's decease; for the Lords thought, the reply being proved, he ought to pay sicklike the duty of that tack owing by

his father, who retained the possession of his own goods, during his life, seeing he entered thereafter to the possession both of tack and goods.

No 175.

Act. *Fletcher.*

Alt. ———

Fol. Dic. v. 2. p. 43. Durie, p. 867.

1662. February 27.

GRAY OF CHALMERS *against* DALGARNO.

No 176.

A GENERAL disposition of moveables, though an incomplete right without confirmation, was sustained to defend the disponent from being liable as vitious intromitter.

Fol. Dic. v. 2. p. 43. Stair.

. This case is No 169. p. 9850.

. A similar decision was pronounced 15th June 1681, Baird *against* Robertson, No 42. p. 3856. *voce* EXECUTOR.

1664. July 6.

BROWN *against* LAWSON.No 177.
Found in conformity with the above.

ALEXANDER BROWN having obtained a decret against William Lawson as vitious intromitter with the goods of umquhile William Lawson of Newmills, he suspends, and *alleges* the decret was unjustly given, because it bears, that he excepted upon a disposition, made by the defunct for an onerous cause, and an instrument of possession of the goods before his death. The charger *answered*, That the decret did bear, that the suspender did judicially acknowledge, that there was no true delivery of the goods.

THE LORDS found this colourable title sufficient to purge the passive title of vitious insromission, providing the defender confirmed within four months; for they thought the defunct's disposition *in articulo mortis*, was rather as a testament or legacy, in satisfaction of the defenders debt, than as *actus inter vivos*.

Fol. Dic. v. 2. p. 43. Stair, v. 1. p. 209.

1666. July 12.

JOHN SCOT *against* Sir ROBERT MONTGOMERY.

No 178.

JOHN SCOT pursues Sir Robert Montgomery, as vitious intromitter with the goods and gear of Sir James Scot of Rossie, to pay a debt due by Sir James to the pursuer. The defender *alleged* absolvitor, because any goods he intromitted with, were disposed to him for onerous causes, by the defunct, and delivered conform to an instrument of possession produced.

No 178.

It was *answered*, That the disposition bears, horse, nolt, insight, plenishing, and all other goods and gear, which cannot be extended to any thing of another kind, nor of greater value, as current money, jewels, silver-plate, chains, &c. which never past by such general clauses, unless it be specially disposed. It was *answered*, That albeit there had been such moveables, and the defender had intromitted therewith, though another having a better right, might evict the same, yet the defender had a probable ground to intromit, which is sufficient to purge this odious passive title.

THE LORDS found the disposition and delivery relevant to purge the vitiosity.

Fol. Dic. v. 2. p. 43. Stair, v. 1. p. 394.

1668. December 23.

SMITH against MUIRE.

No 179.

A relict who, by her contract of marriage, had been provided to the liferent use of the moveables, was found saved from incurring the passive title.

JEAN SMITH having pursued Margaret Muire, as vitious intromissatrix with the goods of George Smith her husband, to pay the sum of L. 110 pounds due by bond, by the said George to this pursuer; his sister obtained decret thereupon, and apprised the liferent of the said Margaret Muire; who suspended, and raised reduction on this ground, that she could not be liable as vitious intromissatrix, because she possessed her husband's moveables by a title, in so far as by her contract of marriage she was provided to all the goods and gear acquired during the marriage, for her liferent use, and so she could only be liable for making furthcoming the true value after her death. The charger *answered*, 1^{mo}, That there could be no liferent of moveables *quæ usu consumuntur*, and all liferents of *usus fructus* must be *salva rei substantia*; 2^{do}, Though a liferent could consist in moveables, yet the meaning of such a clause, of all moveables acquired during the marriage, must be understood the free moveables, deducting moveable debt; and cannot be understood to exclude lawful creditors.

THE LORDS found the clause to be understood only of free gear, and not to exclude the pursuer's debt; but found it a sufficient ground to free the suspender from vitious intromission, and to retrench the decret to the true value.

Fol. Dic. v. 2. p. 43. Stair, v. 1. p. 576.

* * * Gosford reports this case :

GEORGE SMITH having granted bond to Jean Smith for L. 100 immediately before his contract of marriage with Margaret Muire, by which he was obliged to provide the said Margaret to the liferent not only of lands but of all moveables and gear which he should purchase during the marriage;—the said Jean did pursue the said Margaret, as vitious intromissatrix, for payment of the said bond; wherein the LORDS found, that the said liferent provision did free her from being vitious intromissatrix, she finding caution to make her intromission furthcoming after her decease. But they found likewise, that the said liferent

provision did not prejudice any lawful creditor, but gave her right only to the liferent of all moveables *deducto ere alieno*, and could only be extended to free goods and gear.

No 179.

Gosford, MS. No 72. p. 26.

1671. June 16.

BOWERS *against* LADY COUPAR.

THE executors of Mr Frederick Bowers, minister, having obtained decret against the Lord Coupar, for some by-gone stipends, did pursue the Lady Lindores, relict of the Lord Coupar, as intromitter with his goods and gear, for payment. It was *alleged*, That the Lady had right by disposition from Lord Coupar to his whole moveables, which ought to defend her ay and while it were reduced, and that the pursuers ought to confirm themselves executors-creditors to the Lord Coupar. THE LORDS did repel the defence, and found that the disposition being made by the Lord Coupar to his Lady, and the goods remaining in his own possession until his death, could not prejudice lawful creditors, who needed not to reduce, nor to confirm themselves executors-creditors; but did decern the Lady only to be liable for the goods disposed and intromitted with, but not as a vitious intromitter.

No 180.

Found in conformity with Chalmers against Dalgarno, No 176. p. 9857.

Fol. Dic. v. 2. p. 43. Gosford, MS. No 451. p. 169.

. Stair's report of this case is No 68. p. 2734. *voce* COMPETENT.

1674. June 10.

LADY SPENCERFIELD *against* HAMILTON.

FOUND sufficient to elide the passive title, that the defender did intromit either by virtue of a gift to himself, or by warrant from the donatar, though the gift was not declared; for his possession *ab initio* being in virtue of a title, though not perfected, could not be said to be vitious, and *quivis titulus etiam coloratus* purges the vitiosity of the intromission.

No 181.

Fol. Dic. v. 2. p. 43. Stair. Dirleton.

. This case is No 97. p. 9762,

1674. December 16.

DRUMMOND *against* MENZIES.

IN the process at the instance of George Drummond, for payment of a sum due by Alexander Menzies of Rotwell, as intromitter with the debtor's goods, it was found, (as in diverse cases before) That the pretence, that the defunct was rebel, and his escheat gifted, doth not purge vitious intromission, unless it

No 182.

Found in conformity with Lady Spencerfield against Hamilton, *supra*.

- No 182. be alleged, that the defunct's escheat was gifted and declared before intending of the cause, or that the defender did intromit, either by virtue of a gift to himself, or by warrant and right from the donatar for the defender's intromission, though the gift was not declared before the intending of the cause; in respect if there was a gift declared before the intending of the cause, the defender is in the same case as if there were an executor confirmed before the intending of the cause; and if he had either the gift himself, or a right from the donatar before he did intromit, his possession *ab initio* being by virtue of a title, though not perfected, cannot be said to be vitious; and *quivis titulus etiam cloratus*, purges the vitiousness of the intromission.

Reporter, *Strathurd.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 43. Dirleton, No 205. p. 92.

- No 183. 1686. *March.* BELL *against* ELLIOT of Dunlabyre.

A WIFE being pursued as vitious intromitter with goods in Scotland belonging to her husband, who lived and died in England;

Answered, The defender was administratrix to her husband in England (the same thing as executrix confirmed in Scotland) and *mobilia sequuntur personam*. 2do, As *super* intromission is purged of a vitious passive title by a prior confirmation, so, *a pari*, the letters of administration were a putative title that ought to purge the vice.

Replied, The administration gave no right to goods *extra territorium*.

THE LORDS found the administration purged the vitiosity.

Fol. Dic. v. 2. p. 43. Harcarse, (PASSIVE TITLES.) No 66. p. 12.

1738. *December 12.* RENTON *against* WOOD.

- No 184. INTROMISSION by the master with the effects of his deceased tenant, by order or with consent of the widow, for payment of the rent due to himself, found not to infer vitious intromission in the master.

Fol. Dic. v. 4. p. 47. Kilkerran, (PASSIVE TITLE.) No 2. p. 366.

SECT. V.

How and to whom competent to insist upon this Passive Title.

1617. December 18. LORD GAIRLIES *against* KILPATRICK.

No 185.

IN a reduction pursued by the Lord Gairlies against John Kilpatrick, the LORDS repelled an exception, bearing, that the Lord Gairlies was heir to his goodsire in the lands of Dalswinton, in respect his goodsire was infeft as heir to his grandsire in the said lands.

Item, they repelled an exception, that the Lord Gairlies' father was universal intromitter with his goodsire's goods and gear, because, that *eo nomine* he could not be obliged to warrant the heritable infeftment, notwithstanding that he had got an heir.

Fol. Dic. v. 2. p. 43. Kerse, MS. fol. 141.

1630. November 20. PRIDE *against* THOMSON; and STEWART *against* STEWART.

No 186.

In a process for payment of a bond due by the defunct, at the instance of the heir of line, who had no benefit by the succession against the heir of provision, the defence was, that the pursuer was vitious intromitter with the goods of the defunct, and so the debt was extinguished *confusione*. The Lords refused to sustain vitious intromission by way of defence, but sustained compensation to the extent of the pursuer's intromission.

ONE Thomson being pursued as heir of provision to her sister, for registration of a bond of L. 500, made by her said umquhile sister to Thomson, her brother, whereto one called Pride was made assignee, and who pursued that registration;—the defender, who was convened as heir of provision to her sister, the debtor, *alleging*, That the general heir ought to be first called and discussed;—this allegiance was repelled, because the cedent, who was creditor, was that person who would have been general heir, and he compeared and renounced to be heir, albeit he was that person, who, in law, would have been general heir, if he had pleased to serve himself general heir to her, and assisted his assignee in this pursuit; so that the LORDS sustained the process against the heir of provision. And it being further *alleged*, That albeit he renounced to be heir, yet thereby he ought not to be free of this debt, but the pursuit therefore was proper not the less against him, and not against this defender, because he had intromitted with the defunct's goods and gear, whereby he being vitious intromitter, he ought to be liable to the defunct's creditors for their debts, in respect of his vice, and consequently he could pursue none other but himself therefore, whereby the same was confounded;—and the pursuer *answering*, That albeit a creditor have action in law against the intromitters with the debtor's goods, to make him thereby answerable to pay the debts, yet that ought not to be received by way of exception, to allege the creditor, when he is pursuing for his debt, to be intromitter, there-through to exclude his whole

No 186.

debt, albeit he had intromitted (which is not granted) with a small quantity, which could not satisfy the half of his debt;—the LORDS found this allegiance of intromission relevant, only for such quantity as the excipient would condescend upon, and prove was intromitted with by the creditor, to compensate the debt acclaimed *pro tanto*, and no further; and found, that it could not be received thereby, to make him as a vitious intromitter liable for the whole, if the intromission would not extend to so much, albeit he might be pursued that way by another creditor of the defuncts *in solidum* for the whole, by way of action, which was found ought not to be received by way of exception. See July 21. 1630, Fairly *contra* Fairly, No 3. p. 3560.

Act. Gibbon.

Alt. Dunlop.

Clerk, Hay.

* * * Under the above case Durie has the following note:

Upon the 17th January 1632, Stuart *contra* Stuart, one of two daughters, only bairns to their father, of two sundry wives, having pursued her elder sister, as charged to enter heir to her father, and upon her renunciation having intended adjudication against her, the process of adjudication and the said decreet were sustained, albeit the eldest sister was only called, seeing the other sister pursuer could not pursue herself, and she renounced to be heir also; which was found upon both their renunciations; this being proponed by another creditor of their father, who was seeking adjudication also against them, in which process the said creditor compeared; and it was found, that her process should go on with this creditor's *pari passu*.

Fol. Dic. v. 2. p. 44. Durie, p. 540.

No 187.

1671. January 21. CAPTAIN RAMSAY *against* WILLIAM HENDERSON.

CAPTAIN RAMSAY, as assignee constituted by Eupham Scot, to a sum of 2000 merks, addebted by umquhile Mr Charles Henderson, pursues his heir for payment, who *alleged*, *Absolvitor*, because this debt being due originally by Mr Charles Henderson, and by the said Eupham Scot, who being vitious intromissatrix with his goods and gear, and having been assigned to this sum herself, she became creditrix as assignee, and debitrix as vitious intromitter, *et confusione tollitur obligatio*, and this pursuer having right from her, can be in no better case than she. It was *answered*, That vitious intromission was not competent by way of defence.

THE LORDS found that whatever might be said, if the vitious intromitter had been pursuing, whether the defence might have been competent, yet found it not competent against the assignee, seeing the cedent was not *in campo*, and probation behoved to be used against her.

Fol. Dic. v. 2. p. 44. Stair, v. 1. p. 705.

1715. January 28.

ANDREW HOUSTON of Calderhall *against* Sir ALEXANDER MAXWEL of Monreith.

No 188.

A defence of
vicious intro-
mission, pro-
posed by an
heir, sustain-
ed to extin-
guish move-
able debts,
but not herit-
able debts, in
the person of
a vicious in-
tromitter.

THE infestment of the lands of Cultreoch being conceived to heirs whatsoever, Sir Alexander Maxwell agreed with the four sisters of Cultreoch younger, daughters to Cultreoch elder, apparent heirs to both, and obtained from them a disposition to the lands of Cultreoch, with a procuratory to serve them, and to all heritage or moveables whereunto they could succeed as heirs to their father or brother; upon which Sir Alexander intromitted with writs, heritage, and moveables, and paid the debts.

Sir Alexander having taken out briefes for serving his authors, compearance was made for the heir-male, who produced a bond of tailzie by old Cultreoch to his son and his heirs-male, whereupon resignation had been made, and infestment expedite after Cultreoch's death; and thereupon the heir-male being preferred, Sir Alexander pursued the heir-male for payment of the debts, who repeated a declarator that the debts were extinct in his person, in as far as he was vicious intromitter.

It was *answered*, Vicious intromission is not relevant to be alleged for the heir-male; because that passive title operates only in favours of creditors, as was lately found in the case of John Ewing *contra* William Rowan, (*See APPENDIX*). 2do, *Et seperatim*, The heir-male had no pretence to object against heritable debts in the person of the vicious intromitter; because an executor confirmed paying heritable debts has relief against the heir. Our law favours creditors so far, as to subject all representatives, whether in heritage or moveables, to the payment of debts; and again provides relief from one representative against another, according to the nature of the debt. An executor is liable to relieve the heir of moveable debts *secundum vires inventarii*: *E. contra*, the heir is bound to relieve the executor of heritable debts; and a vicious intromitter is only *haeres* or *prohaeres in mobilibus*; but in respect of unwarrantable intromission, the law presumes that the moveables were sufficient to pay all the debts, and does not allow any proportion betwixt the creditors' debts and the intromission; but as an executor having a full beneficial executry, would nevertheless recur upon the heir for heritable debts, so must a vicious intromitter have the same benefit.

It was *replied*, That the creditors have indeed access to pursue either vicious intromitter or heir, the executor *secundum vires*, and a vicious intromitter *in solidum*, and without all relief; and if the creditor pursue the heir, it may indeed be questioned how far the heir might recur against a vicious intromitter, whether *in solidum* or *valorem*. In the case of Ewing against Rowan, it was found, that the heir could not pursue the vicious intromitter for relief. But this is most certain, that the defunct's moveable debts being stated in the person of a vicious intromitter, the same became extinct *ipso facto*. If it were not so, there would be no hazard in vicious intromission, where the defunct had an-

No 188. heritable estate ; and vitious intromission being oft-times by persons who have access to meddle without witnesses, and being always without authority, inventory, or record, it is seldom possible to prove either quantities or value ; and therefore the law has most justly introduced a presumption *juris et de jure*, that the moveable were sufficient to pay the debts, and consequently the same became extinct *ipso facto*. 2do, There is not any law or precedent to distinguish heritable from moveable debts in this case, which cannot but have happened frequently.

“ THE LORDS found, That a vitious intromitter was entitled to pursue the heir for relief of heritable debts ; but sustained the allegiance of vitious intromission to extinguish moveable debts in the person of the vitious intromitter.”

Fol. Dic. v. 2. p. 43. Dalrymple, No 133. p. 185.

No 189. 1729. December 5. LOCH against MENZIES.

Sir WILLIAM MENZIES granted a bond of aliment to his daughter, upon death-bed, for payment of which process was raised against Sir William's representative, upon the passive title of vitious intromission. The defence was, That though this obligation was conceived *per modum actus inter vivos*, yet being granted upon death-bed, and not declared till after death, it was *donatio mortis causa*, which the granter did not design to be binding upon him if he reconvalesced ; and therefore, she had not the benefit of the passive title of vitious intromission, which was introduced in favour only of proper creditors of the defunct, such who could have compelled him by way of process to implement ; and it was added, that a *donatio mortis causa*, in whatever terms conceived, is more properly a legacy than an obligation. THE LORDS found this bond to be a debt relevant to subject the defender as vitious intromitter. See APPENDIX.

Fol. Dic. v. 2. p. 44.

S E C T. VI.

Vituous Intromission Purged by Confirmation, or by declarator of escheat.

THOMSON against THOMSON'S EXECUTORS.

No 190. CONFIRMATION of the defunct's moveables, before process is commenced at the creditor's instance for vitious intromission, purges the vitiosity whoever be the executor. The administration of moveables, after the death of the pro-

prietor, belongs to the church; and when one is decerned executor by the Commissary, it is the same as naming him trustee for the in-gathering the defunct's moveables, which of consequence he has right to claim from every person upon using the form of a confirmation; the vitious intromitter then becomes accountable to him, and regularly to him only, which of course must purge the vitious intromission, because, from the nature of his office, he can insist no further than for compt and reckoning. And though, even after confirmation, action is sometimes sustained to creditors against those who intromit with subjects left out of the inventory of the confirmed testament, which in strict law is competent to the executor only; yet that is no more but a favourable extension for the ease of creditors who have once commenced a process upon vitious intromission, not knowing that there has been an executor appointed, to save the circuit of a new process against the executor, or a confirmation *ad omisssa*; and by the common rules of law an extraordinary remedy can go no farther than the ordinary remedy, in place of which it is substituted. Thus, in a pursuit upon the passive title vitious intromission, it was sustained as a defence, That decret was already recovered by the executor against the defender for her intromissions.

Fol. Dic. v. 2. p. 44.

* * Kerse reports the case alluded to.

IN an action pursued by John Thomson in Leith *contra* The Executors of James Thomson there, it was *alleged* for Bessie Bell, relict, That she could not be convened as universal intromissatrix, because there was an executor decerned, who, by virtue thereof, had obtained sentence against the relict for one half, and for the other half she has found caution to make the same forthcoming. THE LORDS found the exception relevant.

Kerse, MS. fol. 141.

1622. January 12.

BAD against HAMILTON.

FOUND, That an executor confirmed *lite pendente*, cannot be farther obliged than *secundum vires inventarii*; and albeit the pursuer reply upon farther intromission and fraudulent omission, yet the executor shall not be obliged *in solidum*, but according to the quantity of the omission.

No 191.

Fol. Dic. v. 2. p. 45. Kerse, MS. fol. 133.

* * A similar decision was pronounced 14th July 1626, Smith against Gray,
No 17. p. 9660.

No 192.

The defence of confirmation was sustained, where the intromitter obtained one beggar to be confirmed, and another to be cautioner.

1626. July 28.

TENANT *against* TENANT.

IN an action of registration of a bond pursued by one called Tenant, against another so called, who was convened as intromitter with the defunct's goods and gear, debtor to the pursuer; it being *alleged* for the defender, That he could not be convened as intromitter, because, before the intending of the cause, there was an executor confirmed to the defunct; and it being *replied*, That the pursuer's action ought to be sustained against him, as intromitter, notwithstanding of the confirmation of executors, because if any testament was confirmed, the same was most fraudulently done by this same defender, who having first intromitted with the defunct's whole goods, he thereafter, to the effect that the creditors' just actions therethrough competent against him might cease, moved a poor beggar to lend his name to the said executry; and caused another beggar to become cautioner for him; likeas not only he bestowed the whole expense upon the said confirmation, and paid the quot of the testament, and also promised to warrant the executor of all action and danger, which he might incur, by his being executor; but the said executor concurred with the pursuer at the bar, in this pursuit; and so in effect the said excipient is both executor and intromitter, in respect of the which exemplary fraud, the defender ought to be only found his just debtor, and the pursuer ought not to be excluded by this indirect dealing, from his just debt, which is in effect all that he has, but the defender's exception ought to be repelled. This exception was admitted by the LORDS, notwithstanding of the reply, for the LORDS found, That executors being confirmed, the process behoved to cease against the intromitters; and if any fraud were done by the excipient, the same in this place could not exclude this action; and if the excipient made any promises to relieve the executor, the pursuer had his action competent against him thereupon, after that the executor was found his debtor.

Act. Miller.

Alt. ———.

Clerk, Gibson.

Fol. Dic. v. 2. p. 45. Durie, p. 230.

No 193.

1628. January 24.

JOHN ADIE *against* JOHN GRAY.

JOHN ADIE pursued John Gray as universal intromitter with his father's goods and gear. *Alleged*, He could not be convened as intromitter, because he is executor confirmed to his father, and so has *beneficium inventarii*, and should be comptable only for the free gear in the testament. *Replied*, That he has confirmed himself executor after the intending of the pursuer's cause. *Duplied*, That he did confirm within year and day, which he might do lawfully, notwithstanding of the pursuer's action intended. THE LORDS found the exception

and duply relevant, and sustained the action against the defender only as executor. No 193.

Fol. Dic. v. 2. p. 45. Spottiswood, (EXECUTORS.) p. 114.

*** Durie reports this case :

1628.—*January 24.* JOHN ADIE pursues John Gray in Leith, for payment of a debt owing to him by the defender's father, for which payment he was convened as intromitter with his father's goods, &c. The defender *alleged*, that he could not be pursued as intromitter, seeing he was confirmed executor to his father, which allegiance was sustained ; in respect whereof the LORDS found no process against him *hoc nomine*, as intromitter, and nevertheless that the defender was confirmed executor *post hanc litem captam* ; yet the said allegiance was sustained, seeing he was confirmed within year and day after the defunct his father's decease ; but the LORDS in the same action sustained process against the defender as executor, seeing he himself was executor, who was convened as intromitter, and so there was no reason to put the party to any new process against him, seeing he had once deduced his process legally, in a lawful manner, against him who then was only intromitter ; and his being executor *ex post facto*, by that deed done by him since, could not impede the course of his proceeding against him in this same procedure, as executor ; albeit if any other but the defender's self had been executor, the party behoved to pursue that executor by a new process, and the process against the intromitter would have ceased ; and so the defender being executor, had *beneficium inventarii*, which he as intromitter could not have.

Act. Primrose.

Alt. Mowat.

Clerk, Hay.

1628. *January 26.*—IN the cause betwixt Adie and Gray, mentioned *supra*, January 24th 1628, the pursuit being sustained against the defender as executor, albeit confirmed *post litem captam* ; and therefore the defender, who by the confirmation had *beneficium inventarii*, *alleging*, That the goods confirmed were exhausted by payment made by him to creditors of the defunct, to whom this defender was cautioner for his father the defunct, who had registrate their bonds against this excipient, the terms of payment being all by-past, and the bonds registrate before the intenting of this pursuit, and payment also made before the same ; this exception was sustained, albeit the pursuer *replied*, that this defender being obliged as cautioner for his father, his paying of the creditors, could not make defalcation of the defunct's goods to the defender, seeing the defender behoved here to be considered as another creditor of the defunct's ; and so seeing the pursuer had intended his action against him for his debt, before he was confirmed executor, he cannot be debarred, but must have the defunct's goods made forth-coming to him, being first in his diligence, there be-

No 193.

ing no pursuit moved against the excipient by any other of the defunct's creditors; for albeit he was cautioner for the defunct, and had paid for him; yet that behoved to be respected, as done for liberation of his own debt, he being bound himself, and cannot have respect to the defunct's debt, no pursuit being moved against him as executor to the defunct, but as a cautioner who was personally obliged; neither can the relief seeking upon the defunct's gear by the defender, which makes him a creditor to the defunct, be respected to be more valuable to him, but from that time when he was confirmed executor, and that is after the pursuer's diligence; so that his being full-handed with his father's goods, they cannot be retained by him for satisfying of his own debt totally, and to prejudice the pursuer of his, but ought to be made forth-coming proportionally to them all *pro rata*. This reply was repelled, for the LORDS found the defender might defalk and exhaust the goods in the testament, for relief of the sums paid by him before the intending of the pursuer's cause, wherein he was preferred to the pursuer, albeit he intended this cause before the confirmation, but if the payment had been made since the intending of this cause, it would have been more questionable, if it should have been allowed to the pursuer's prejudice; likeas the 2d February 1628, in this cause, the defence being reformed and restricted, that he was only cautioner for the father for sums, whereof the terms of payment were past before the intending of this cause, albeit neither sentence nor payment was before this cause, yet he had reason to retain for his relief of the debts confirmed, whereof the term was past, as said is, for he was an inevitable debtor;—this allegiance was repelled, seeing no payment made before the confirmation, and so he ought only to come in *pro rata* with the other creditors.

Act. ———

Alt. Mowat.

Clerk, Hay.

Durie, p. 330. & 332.

1628. March 21.

LINDSAY's Relict against ELLEIS.

No 194.

Where one intromitted, who was named executor by the defunct, vitiosity was purged by a confirmation *post litem motam*, altho' after year and day.

In a double poinding by the Relict of Bernard Lindsay, against Patrick Elleis and Sir John Dalmahoy, and certain other creditors of her umquhile husband, Patrick Elleis having pursued the relict for payment of his debt, as intromissatrix with her husband's gear; after the intending of the which cause, she having confirmed herself executrix to him, albeit it was two years after her husband's decease, yet the action was only sustained against her as executrix, that she might have *beneficium inventarii*; and sicklike during this dependence, after Patrick Elleis's citation, the Laird of Dalmahoy her son-in-law, being also a creditor, intended action, and obtained decreet against her, conform whereto she made payment to him, and which exhausted the goods contained in the testament; in respect whereof she *alleged* she should be assoilzied from Patrick.

Elleis's pursuit;—this was found relevant, and the payment made by her allowed, and the Laird of Dalmahoy preferred; albeit Patrick Elleis *replied*, That he ought to be preferred, or at least should come in with other creditors to be equally answered, seeing he was anterior in diligence, and during his dependence by favour of the relict, she had given way to her good-son's process, who had intented this action since he had cited her, and had kept his process in her procurator's hands, while the other had passed through his decret by collusion betwixt them; which fraud ought not to be sustained. This reply was repelled, and the creditor, posterior in diligence as said is, was preferred.

Act. *Learmonth.*

Alt. *Belsher.*

Fol. Dic. v. 2. p. 45. Durie, p. 365.

1629. March 5. ARCHIBALD THOMSON against The LAIRD OF RENTON.

ARCHIBALD THOMSON convened the Laird of Renton, as universal intromitter with the goods and gear of William Douglas of Ively, to hear and see a bond granted by William to the pursuer, registered against him as intromitter fore-said. *Alleged* by him, He could not be convened as intromitter, because there was one decerned executor-dative to William, which executor disposed the said goods to him. *Replied*, Not relevant, unless he would say, there was an executor confirmed before the intending of this cause, who disposed the same to him; for there is no right that any man can have to intromit with the goods of a defunct, except by a confirmed testament. *Duplied*, No necessity, because the executor being decerned, he behoved to take a time before he confirmed, till he knew what goods and gear were to be confirmed; and being now confirmed, albeit after the intending of the pursuer's cause, it must liberate the defender of his intromission, which was by the executor's warrant.—THE LORDS found the exception and duply relevant; for it is lawful to an executor decerned to confirm at any time before year and day expire, and to purge his former intromission thereby, although there were never so many pursuits intented against him before his confirmation.

Fol. Dic. v. 2. p. 45. Spottiswood, (EXECUTOR.) p. 120.

1630. November 25. MINIMAN against RAMSAY.

WILLIAM MINIMAN pursuing David Tindale and Elizabeth Ramsay, as executors or intromitters with the goods of John Fullerton, burgess of Dundee, his debtor, to pay him his debt, Tindale *alleging*, That he could not be pursued as intromitter, because Ramsay, the other defender called, was executor.

No 194.

No 195.
Found in conformity with
No 193. P.
9866.

No 196.
Found in conformity with
No 194. P.
9863.

No 196.

confirmed to the defunct, in respect whereof, albeit the said testament was confirmed *post captam litem*, and after expiring of a year, and much more after the defunct's decease, yet seeing it was a testament *testamentar*, made by the defunct's own nomination, of Ramsay his relict, to be his executrix, and that she was also called in this same process, whereby the pursuer's action would proceed against her; therefore, the LORDS found no process against the other party, who was called as intromitter, seeing he was liable to the executor, and the executor to the creditor.

Act. Russl.

Alt. ———

Fol. Dic. v. 2. p. 45. Durie, p. 541.

*** In this case a conjunct intromitter, called in the process, was assoilzied from vitious intromission, and found only accountable to the executor testamentary; but, in other cases, where such indulgence is not given, a confirmation after year and day will be no defence against a process already commenced; and this was, in the case of Cochran against Sturgeon, 20th March 1624, No 146. p. 9825. so strictly taken, that a confirmation, after year and day, was not sustained, being posterior to the execution of the summons, though before the day of comparance.

1630. November 26.

FULLERTON against KENNEDY.

No 197.

Declarator upon a defunct's escheat, obtained before any suit at the instance of any creditor against a vitious intromitter, is sufficient to purge the intromission with the defunct's moveables.

ONE Kennedy, relict of Dalrymple of Stairs, being convened as intromissatrix with her husband's goods, to hear her husband's obligation granted to the pursuer, upon a certain sum registered *hoc nomine* against her; the LORDS found, that she, as intromissatrix, was not holden to pay the same, in respect that her husband died rebel, and his escheat was gifted and declared at the instance of Kennedy donatar thereto, to whom she was countable for her intromission; which exception was found relevant; albeit it was *replied*, That her intromission going along before the granting of the gift of escheat and declarator, that preceding vitious intromission could not be purged by the subsequent taking of the gift of escheat, specially seeing her own brother is donatar thereto, and that she has ever kept the possession since her husband's decease, and was never unquieted by the donatar; which reply was not respected, for the LORDS found, that the donatar would be preferred to the creditor, and that the relict would be countable to the donatar; and respected not the conjunction of the relict with the donatar, seeing the relict might have taken the escheat to herself *proprio nomine*, her husband being dead; seeing a stranger might have done it, and so might she to her own use; and as there could not a testament be confirmed valuably of the rebel's, whereby his gear might be claimed; either

by the relict's bairns or executors, in respect of the said rebellion, no more can the intromissatrix be liable for the gear to any but to the donatar.

No 197.

Fol. Dic. v. 2. p. 46. Durie, p. 542.

. Spottiswood reports this case :

N. being addebted to Mr David Fullerton in a certain sum, Mr David intented an action of registration of the same sum against Kennedy, relict of the said N. his debtor, as intromissatrix with her husband's goods. *Alleged*, She could not be convened as intromissatrix, because her husband died at the horn, and his escheat was gifted and declared before the intending of the pursuer's cause, and the donatar had given her permission to intromit, and had discharged her of her intromission; so that she was countable to no other. *Replied*, That she had intromitted before the gift, which intromission of hers being once vitious, could not be purged by the subsequent gift and discharge; likeas the gift was taken by the defender's brother, and so in effect to herself.—THE LORDS found the exception relevant, and that the donatar's discharge purged her intromission, although prior; likeas, they regarded not that the gift was given to the defender's brother, for they thought she might have taken it herself, and that it would have wrought a liberation to her as well as if a stranger had got it.

The same found betwixt William Mudie and James Hay of Tourland, 29th November 1633.

Spottiswood, (ESCHEAT and LIFERENT.) p. 104.

. Similar decisions were pronounced, 27th January 1636, Straiton against Chirnside, No 17. p. 5395.; 10th June 1674, Lady Spencerfield against Hamilton, No 97. p. 9762.; 16th December 1674, Drummond against Menzies, No 182. p. 9859.

1632. March 28. MAXWELL against LA. STANLIE.

THE relict of L. Stanlie being convened by Margaret Maxwell, one of his daughters, as intromissatrix with her husband's goods, to pay some debt to her; and the relict *alleging*, That one of the defunct's sons was executor confirmed, and who ought to be answerable to the creditors, and who had found responsal caution at the confirmation of the testament; and the pursuer *replying* upon the defender's fraud, in confirming of a minor, especially seeing herself was nominated executrix by the defunct's self; likeas she intromitted with her husband's goods before she confirmed the minor; as also, she hath intromitted with many other particulars (whereon the pursuer condescended) beside and attour the goods confirmed, whereby she was *in dolo*, and so ought to

No 198.

A relict being sued for vitious intromission, the defence was sustained, that there was an executor confirmed, altho' some particulars she had intromitted with were omitted in the inven-

No 198.

tory, but she was required to account for her intromissions, so far as not contained in the confirmed testament, without necessity upon the creditor to take a dative *ad omisa*.

be liable to the pursuer, as universal intromissatrix; and the defender *duplicating*, That it was lawful to her to accept or renounce to be executrix, albeit she had been nominated by the defunct, seeing the confirming of another, where there is also sufficient caution, is no more prejudicial to the creditors than if she had been confirmed, for the confirmed goods will be made furthcoming to the creditors; and her alleged further intromission with goods omitted, unconfirmed, cannot make her universal intromissatrix, to make her so liable for debts of her husband's, amounting to greater sums than either she is worth, or all her husband's own estate might pay; but the most that thereby can result on her alleged omission, is to take a dative *ad omisa*.—THE LORDS, notwithstanding that there were executors confirmed, and notwithstanding of the allegiance foresaid, sustained the action against the defender as intromissatrix, without necessity to take a dative *ad omisa ad hunc effectum*, only to infer sentence against her to make the particulars, wherewith she shall be proven to have intromitted, besides the goods confirmed, furthcoming to the pursuer for her debt alienarly, and not to make her liable as universal intromissatrix thereby, either to his creditor, or to any other of the defunct's creditors, if the intromission to be proven shall not be found to be so much as will pay the debt; and respected not the reply to make her further liable.

Fol. Dic. v. 2. p. 45. Durie, p. 634.

* * * Spottiswood reports this case :

IN an action pursued by Margaret Maxwell against the Lady Stanly, as universal intromissatrix with her husband's gear, notwithstanding that the defender had given up inventory, and made faith thereon in name of her son, whom she had confirmed executor, and that further intromission was offered to be proved upon her than was given up; yet the LORDS did sustain action against her as universal intromissatrix, only to infer payment for as much more as should be proved against her.

Spottiswood, (EXECUTORS.) p. 112.

1635. July 17.

LO. JOHNSTON *against* JOHNSTON.

No 199.

A natural son, after intromitting with the defunct's moveables, obtained a gift of his escheat, and commenced declarator, upon which

LO. JOHNSTON pursuing James Johnston, as universal intromitter with the goods and gear of umquhile Captain James Johnston, to pay to him a debt owing by the said Captain, who was the defender's natural father; and he excepting, that he was donatar to the escheat of the said Captain, whereupon he had action of general declarator depending, wherein litiscontestation is made, by virtue of which gift of escheat he had right to the defunct's goods and moveables, so that this intromission would not make him liable to any of the de-

funct's creditors; and the pursuer *replying*, That the defender, immediately after the defunct's decease, intromitted with all his whole goods, both within and without the houses, and used the same at his pleasure; which intromission cannot be purged by any subsequent right of his escheat, purchased by the defender *ex post facto*, and a long space after his intromission; for, by his preceding vitious meddling with the defunct's goods, he became liable to his creditors; and that deed cannot be purged, by purchasing of the gift of the escheat thereafter, which was not purchased while the space of after his said intromission, specially also seeing there is no declarator obtained upon the said gift hitherto; and the case of the creditors is most favourably to be considered against a donatar;—this exception upon the gift, albeit purchased after the intromission, and declarator depending thereon, wherein litiscontestation is made, albeit not yet decerned, was found relevant, and sustained to purge the preceding intromission, and to elide the action pursued against the defender, as universal intromitter.

Act. *Stuart*.Alt. *Nicolson*.Clerk, *Scot*.*Fol. Dic. v. 2. p. 46. Durie, p. 771.*

No 199.

there was
litiscontestation.This was found relevant to purge vitious intromission in a process at the instance of the creditors against him, he being *in cursu diligentie*.

1662. February 7.

GRAY against DALGARDNO.

A GIFT of escheat to the intromitter himself, *ante litem motam*, is sustained to purge vitiosity, though there be no diligence on it. The reason given is, that the gift to the intromitter himself is effectual without declarator;—but of this there is some doubt. A special declarator indeed is not necessary, but a general declarator, which is not a process for payment, but a step of diligence, in order to complete the conveyance, like the intimation of an assignation, ought to be requisite in all cases.

Fol. Dic. v. 2. p. 46. Stair.

. This case is No 169. p. 9850.—A similar decision was pronounced 22d January 1675, Chalmers against Farquharson and Gordon, No 45. p. 9683.

1663. January 28.

MARGARET STEVENSON and her SON against KER and Others.

MARGARET STEVENSON pursues Margaret Ker, as vitious intromissatrix with the goods of her husband, for payment of a debt, wherein he was cautioner. She *alleged*, Absolvitor, because her intromission was purged, in so far as she had confirmed herself executrix creditrix. It was *answered* by the pursuer,

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No 201.

Vitious intromission purged by the intromitter's confirming within year and day after the defunct's death.

- No 201. *Non relevat*, unless before intenting of the cause. The defender *answered*, It was sufficient, being within year and day after the defunct's death ;
Which the LORDS found relevant.

Fol. Dic. v. 2. p. 45. Stair, v. 1. p. 164.

1665. July 4. Mr WALTER INNES *against* GEORGE WILSON.

No 202.

Vicious intromission elided, because the intromitter had warrant from the donatar of the defunct's escheat.

INNES of Auchbuncart being pursued as heir to his father, upon all the passive titles, *alleged*, That his father was denounced rebel, and his escheat gifted, and the defender had right or warrant from the donatar before intenting of this cause. The pursuer *answered*, *Non relevat*, except the gift had been declared, and that the defender's intromission had been after declarator and the warrant, but the intromission being anterior cannot be purged *ex post facto*. The defender *answered*, That, as the confirmation of an executor excludes vicious intromission had before the confirmation *ante motam litem*; so the gift and warrant, though without declarator, purge anterior intromission *ante motam litem* ;

Which the LORDS found relevant.

Fol. Dic. v. 2. p. 46. Stair, v. 1. p. 294.

* * * Newbyth reports this case :

GEORGE WILSON pursues Mr Walter Innes for payment of 2000 merks, upon this passive title, that he had intromitted with his father's moveable heirship, which father was his debtor. It was *answered* by the defender, That his father died rebel, and at the horn, and his escheat gifted after his decease, and declared, so that the donatar had the only right to his moveables; and that any intromission he had, if he any had, could not infer *gestionem pro herede*; because the defunct was denuded by the rebellion and gift, and the intromitters behoved to be countable to the donatar. It was *replied*, That the defender did intromit with the moveable heirship before the gift was declared. To which it was *duplicated*, That albeit he had intromitted before the declarator, yet his intromission being after the gift, it can never infer *gestionem*; because, by the gift, *jus est quasitum* to the donatar; so that, albeit the heir were entered, he could have no right to the moveable heirship, and so his intromitting therewith could not infer a gestion no more than in the case of an expired apprising, where the apparent heir intromits with his mails and duties of the lands appraised. This defender having right by assignation to his father's gift of escheat,—the LORDS found the assignation to the subsequent gift of escheat sufficient to purge the defender's preceding intromission with his father's moveables.

Newbyth, MS. p. 32.

1680. January 1. URQUHART against DALGAIRNO.

JOHN URQUHART pursues Arthur Dalgairno, as vitious intròmitter with his father's goods, for payment of a bond due by his father to the pursuer. The defender *alleged*, Absolvitor, because his father died in September at the horn, and he did all possible diligence to purge vitious intromission; and, in November thereafter, at the first time the Exchequer did sit after his father's death, he had obtained the gift of his father's escheat, which hath the same effect as if he had confirmed himself executor to his father, which would unquestionably have purged vitious intromission; for, where the defunct is rebel, the habile way is a gift of escheat, and not a confirmation. The pursuer *answered*, That neither confirmation nor gift could exclude vitious intromission, unless they had been obtained *ante litem motam*: but here this pursuit was moved before the gift. It was *replied*, That albeit the ordinary terms of the defence of confirmation be *ante litem motam*, yet if the pursuit be intended before confirmation, or gift can be obtained, it is sufficient that there is no negligence in obtaining thereof; but unto wives, children, or any having interest in the moveables of defuncts, a term to confirm, or to obtain a gift, is necessarily required, and ordinarily allowed for six months at least; and it were inconsistent with law and reason, that if creditors should use citation within a day or two after the defunct's death, that thereby vitious intromission should be inferred, which could not be purged by confirmation or gift, though obtained as soon as it were possible. It was *duplied*, That *lis mota* ought to stop all meddling, at least it did oblige the meddlers to get warrant from the Commissaries to intromit upon inventory, till edicts might be served, and confirmation past; and, whatever may be allowed to the wife and children in the family, to preserve the goods for some time, till confirmation or gift were taken, yet this defender, who was *extra familiam*, and forisfamiliaried, could not without inventory meddle. It was *triplied*, That the defender did not meddle as *prado*, but did meddle as having just interest in the goods, for relieving of his father's debts and his estate.

THE LORDS found, that the defender having an interest to preserve his father's moveables, and having followed the habile way of obtaining the gift of escheat, obtained in November, whereas his father died in September, that it was sufficient to purge vitious intromission, although the intromission was after citation, and albeit he had no warrant from the Commissaries to intromit upon inventory, which is not an ordinary method, but used by the more knowing and cautious. This cause being so determined in December last, and the whole debate being repeated in a bill by the pursuer, this day the LORDS adhered to their former interlocutor.

Fol. Dic. v. 2. p. 46. Stair, v. 2. p. 729.

54 Y 2

No 203.

Where the gift of escheat was taken out without delay after the rebel's death, it was sustained to purge vitious intromission, though the gift was *post litem motam*.

No 204.

1685. *January*. Sir PATRICK HOME *against* ———.

FOUND, that a confirmation within year and day after the defunct's decease, did purge vitious intromission, though the confirmation was posterior to the pursuit upon the passive title, which was raised within the year.

Fol. Dic. v. 2. p. 45. Harcarse, (EXECUTRY.) No 463. p. 126.

1701. *July 3.* JAMES ALEXANDER *against* KATHARINE LISTON.

No 205.
Found in conformity with
the above.

KATHARINE LISTON, relict of William Peat, being pursued by James Alexander, on the passive titles, for payment of a debt of her husband's, before the Commissaries of Edinburgh, she raised an advocacy, on this reason, That the Commissaries had repelled this defence proponed for her, that she could not be vitious intromitter, because she had confirmed herself executor within the year after her husband's decease, and that in respect of this answer, that she never offered to confirm till after citation at the pursuer's instance, and so that could never purge the vitiosity of her prior intromission.—THE LORDS considered, that year and day was allowed by our law for discovering the defunct's estate, and making inventory, and that diligence by the creditors before that was nimious; and therefore, though they should prevent the confirmation by intending a process, yet if the confirmation were expedite within the year, it would save this odious passive title; and it has been oft so decided, 24th January 1628, Aldy *contra* Gray, No 193. p. 9866.; March 21. 1628, Eleis *contra* Lindsay, No 194. p. 9868.; and 28th January 1663, Stevenson *contra* Ker, No 201. p. 9873. where they were found in such cases to be only liable *secundum vires inventarii*; and Stair is of the same opinion, B. 3. T. 9. It was *alleged* here, That if she had only made use of the goods within the year for preservation, or *custodiæ causa*, it might have excused, but she had sold and disposed on some of them, which the Lords did not regard, because it was for the necessary maintenance of the family, and for payment of the rent of the room laboured by her husband; and therefore found the Commissaries had judged wrong, and advocated the cause to themselves.

Fol. Dic. v. 2. p. 45. Fountainhall, v. 2. p. 117.

No 205.

1705. *June 29.* ARCHIBALD *against* LAWSON.

THE inventorying and rousing of goods vitiously intromitted with, though done by authority of a Magistrate, *ante litem motam*, was found not to purge the antecedent vitiosity.

Fol. Dic. v. 2. p. 46. Forbes. Fountainhall.

* * This case is No 152. p. 9829.

DIVISION V.

Accepting a Disposition with the Burden of Debts.

1662. December 2.

DAME MARION CLERK *against* JAMES CLERK of Pittencrief.

No 207.

MR ALEXANDER CLERK, his estate being tailzied to his heirs male, he obliged his heirs of line to renounce and resign the same in favour of his heirs male ; which disposition he burdened with L. 20,000 to Dame Marion Clerk his only daughter, and heir of line. The clause bore L. 20,000 to be paid to her out of the said lands and tenement ; whereupon she having obtained decret, James Clerk the heir male suspends on this reason, That the foresaid clause did not personally oblige him, but was only a real burden upon the lands and tenement, which he was content should be affected therewith, and offered to assign and dispoise so much of the tenement as would satisfy the same.

THE LORDS found the suspender personally obliged, but only in so far as the value of the tenement might extend ; in respect the clause in the disposition mentioned the sum to be paid, which imports a personal obligation, and whereby the suspender, accepting the disposition, is obliged to do diligence, to have sold the tenement, and paid her therewith ; and therefore found the letters orderly proceeded, superceding execution of the principal sum for a year, that *medio tempore* he might do diligence to sell and uplift.

Fol. Dic. v. 2. p. 39. Stair, v. I. p. 147.

1675. December 8. THOMSON *against* The CREDITORS of THIN.

No 208.

WHERE a dispoinee is not taken bound personally to pay, but the subject only disposed, *with the burden of debts*, he is not personally liable by acceptance, further than to the extent of his intromission.

Fol. Dic. v. 2. p. 39. Stair. Gosford. Dirleton.

. This case is No 6. p. 3593.

1678. December 3. LORD WAMPHRAY *against* JOHNSTON.

No 209.

ACCEPTANCE of a disposition, binding the receiver to pay the granter's debts, makes the receiver liable universally, without regard to the extent of the subject dispoinee. See APPENDIX.

Fol. Dic. v. 2. p. 39. Fountainhall, MS.

No 210.

A disposition granted by a defunct, in favour of a party, had been borrowed up from the Commissary Clerk by that party, and by him renounced in favour of the heir, when he received a sum of money. He was considered to have accepted the disposition, which being with the burden of debts, he was found liable for them.

1699. June 8. ORD'S RELICT *against* JOHN LUTEFOOT.

AGNES INNES, relict of Laurence Ord, William Oliphant merchant in Edinburgh, and John Doull, writer there, as creditors to the said Laurence, pursue John Lutefoot, writer to the signet, as he who accepted a disposition from the said Laurence Ord of his whole estate, with the burden of his whole debts and legacies, in so far as Laurence's papers being, after his death, by warrant of the Commissaries, sequestrated at the Creditors' desire, the said John Lutefoot had borrowed up that disposition, which was lying with the rest, and had entered into a transaction with Christian Ord, Laurence's only daughter, and William Graham her husband, and renounced the said disposition in their favour, on their paying him 2200 merks as a reward.—*Alleged* for John Lutefoot, That he was so far from accepting of that disposition, or doing any deed importing a homologation of the same, that he had expressly repudiated it, and declared he would have no benefit of the same, in so far as he had renounced it in favour of the said Laurence's heir; and she being served heir, the creditors had no prejudice, for she and her husband would be liable; and he did not transact rashly, but by the advice of lawyers; and the gratuity given him was no price for his renunciation, but expressly given for the many services he had done to Laurence, the defunct.—*Answered*, He taking up the disposition from the Commissary-clerk, and never returning it, was a clear acceptance; and his renunciation being *in favorem*, and not simple, can never liberate him; and though he depones in his oath, that the gratuity was merely for his services, yet *res ipsa loquitur* that it was for the renunciation; and her being served heir imports nothing, seeing she has done it *cum beneficio inventarii* on the late act of Parliament; so the whole is but a contrivance to defraud creditors, and John Lutefoot may recur against her for his relief.—THE LORDS found his acceptance sufficiently proved, and therefore found him liable, and decerned; especially *res* not being *integra* to the creditors, who were damnified by it, and that his disposition was burdened with the debts.

Fol. Dic. v. 2. p. 39. Fountainhall, v. 2. p. 50.

No 211.

1737. December 21. MONTGOMERIE *against* MONTGOMERIE.

ONE disposed a tenement to a stranger, with this provision, 'That the donee, by accepting of the disposition, should be bound to pay a yearly annuity to the grantee's heir.' In a process for payment of the annuity, the defence was, That he had not as yet resolved, whether he would accept of the disposition, and there is no law obliging him to accept within a limited time.—*Answered*, This is implied in the nature of the thing. It would be unreasonable to bring the pursuer under the necessity of entering heir, and subjecting him-

self to all the predecessor's debts, in the view of carrying a subject, which might be taken from him the next day by the disponee; and it would be as unreasonable for the disponee to stand silent, and neither touch the rents himself, nor allow them to be touched by the pursuer.—THE LORDS found the defender must either accept or repudiate. See APPENDIX.

Fol. Dic. v. 2. p. 38.

No 211.

1736. February 19.

ALEXANDER MACBRAIR *against* GRIZEL and ANN MAITLANDS.

THE deceased George Maitland of Eccles having five daughters, granted different bonds of provision to them for 5000 merks each, payable at his death, in full of all succession they could have in his heritable estate, &c.; containing clauses dispensing with the not delivery.

In the 1702 he died, leaving behind him a son, who also died soon thereafter; whereupon the daughters entered into a transaction with Dr Maitland their uncle, *anno* 1703, whereby they assigned to him their bonds of provision; in consideration whereof, he gave each of them his bond for the like sums; in the right of which, and of others which had been conveyed to him, he adjudged the estate of Eccles, *anno* 1706.

After this, he granted an obligation to his nieces; wherein he "bound himself to free them of their father's debts, they always granting renunciations to enter heirs to their predecessors in his favours, when required."

The Doctor obtained possession of the estate, in virtue of his adjudication; and, after his death, the said Alexander Macbrair, as having right to an old process of compt and reckoning against George Maitland and others, transferred it not only against the Doctor's heir, but likewise against the daughters as representing the said George Maitland; and a proof of the passive titles having been granted, when the same came to be advised, the LORDS found them not proved, so as to make the daughters universally liable. But, from the above state of the facts, this question occurred, Whether or not they were liable *in valorem* of the sums received from their uncle?

The defence offered for them was; That they could not be liable; as they had not received payment out of any of their father's effects, conform to the decision 5th July 1666, Laurence Scot, No 50. p. 9694.

To which the pursuer *answered*; That it was hard the debtor's estate should be carried off by a contrivance betwixt the heir-male and the heirs of line; the first of whom pretending he was not liable, as his only right to the estate was in virtue of singular titles; and, with respect to the daughters, that they had not meddled therewith. But, when it is considered that Dr Maitland, as their assignee, has carried off the estate upon an adjudication, chiefly founded on their bonds of provision, they surely must be held as lucrative successors, as

No 212.

Bonds of provision granted to daughters, which they assigned to the heir-male, who granted them his own bonds, and adjudged the estate on theirs, found not to subject them in payment of their father's debts.

No 212.

much as if their father had disposed part of his estate to them. And, if this was not sustained, it would be easy to evade that passive title altogether; for a father had no more to do but grant a bond to his apparent heir, who may transmit it to a third party, and he again adjudge; by which means neither the one nor the other could be reached.

In the *next* place, it is obvious, that the intention of parties was, That the Doctor should have the estate, and his nieces, who had a right thereto, should renounce; which implied a vendition or conveyance in his favours; therefore they ought to be liable to the extent of the sums received, which they may very properly be said to have received out of their father's fortune; seeing the onerous cause thereof was their renouncing to be heirs to him in their uncle's favours, whenever he should think proper to require them.

With regard to the decision quoted for the defenders, it does not apply to this case; in so far as the heirs of line there had no right whatsoever to their predecessor's estate, the same being specially provided to heirs-male; therefore, what was given to them was a mere gratuity. But here, as the daughters had an undoubted right, what they received was no gratuity, but a transaction, in consequence of which they gave up what they had a title to claim.

Replied for the daughters; It is a new doctrine to plead, That a bond of provision to a daughter was a *præceptio hæreditatis*, or that she could be liable *in valorem*, without proving that payment had been made out of her father's effects; seeing it is only in that case the creditor's fund of payment would be impaired; therefore the pursuer has no title directly to attack them. If, indeed, the regular method is followed, he ought to constitute his debt against the apparent heirs, and thereon adjudge, whereby he will be entitled to compete with or challenge the rights of other creditors, who, if they set up these bonds in competition, he may insist to have them reduced or set aside.

As to the gloss put upon the Doctor's obligation, making it equal to an actual conveyance, there can be nothing more unnatural; seeing the plain meaning thereof, as appears from the whole contexture of it, is, that, in regard the daughters had got nothing out of their father's fortune, and that the Doctor was in possession of it for payment of debts above the value, he, by way of gratuity to his nieces, bound himself to relieve them of their father's debts, they always renouncing to be heirs, when charged by any of his creditors. Besides, there is no evidence that they ever accepted of the obligation, or upon that account were obliged to renounce their father's succession. Nor is the answer to the decision of any weight; as the *ratio decidendi* is allenarly founded on this principle, That the creditors were not prejudged by the renunciation, agreeable to which the defenders agree this question should be determined.

THE LORDS found the daughter not liable *in valorem* of the sums contained in their bonds of provision, in regard they got not payment thereof out of their father's estate.

C. Home, No 25. p. 43.

1744. July 5.

EXECUTORS-CREDITORS of Mr HUGH MURRAY KYNYNMOUND, Advocate, *against*
 Mrs AGNES MURRAY KYNYNMOUND, &c.

No 212.

A Disponee found not liable to pay the debts of the disponent, further than the value of the subjects disposed, tho' he omitted to confirm and inventory the same.

ANNO 1710, Sir Alexander Murray executed an entail of his lands of Melgund, &c. in favours of himself in liferent, and to Sir Alexander Murray last deceased, his son, and the heirs-male of his body in fee, &c. And by a deed, of the same date, relating to the entail, failing heirs of his own body, he substituted Mr Hugh Murray (then Dalrymple) his brother uterine, and the heirs of his body, &c. The disposition contained strict prohibitive, irritant, and resolute clauses; and, in particular, it provided, that it should not be in the power of Sir Alexander, the first institute, nor any others of the heirs of entail, to alienate or contract debt; declaring all such deeds to be void and null; and, in the end thereof, there was a precept for infefting Sir Alexander, "with and under the express provisions, declarations, burdens, reservations, faculties, restrictions, &c. above specified, and no otherwise." A few days thereafter, sasine was taken thereon, without repeating the prohibitory and irritant clauses *verbatim* in the instrument of sasine; but it recited the disposition, and that sasine was granted under the express "conditions, provisions, declarations, burdens, &c." mentioned in the foresaid bond and right of tailzie, and which are held as repeated *brevitatis causa*. Anno 1713, the maker of the entail died, whereupon his son Sir Alexander entered to the possession of the estate, in virtue of the tailzie which was duly recorded in the year 1724.

Sir Alexander having got possession, he contracted several debts, posterior to the registration; and, in the 1736, having no hopes of issue of his own body, he executed a disposition in favours of Mr Hugh Murray, of all his subjects heritable and moveable, which should belong to him at his death, other than those which should relate to the entailed estate, burdened with the disponent's debts.

Soon after the date of this disposition, Sir Alexander died, whereupon Mr Hugh Murray completed his titles to the estate, by serving himself heir of tailzie, under the several prohibitory, irritant, and resolute clauses in the original entail; and, in consequence of the disposition last mentioned, he intromitted with the whole of Sir Alexander Murray's effects, without confirmation, or making up any inventory, from which the extent of these effects could be made appear. He likewise paid several of his personal debts, to some of which he took discharges, and to others assignments. Mr Murray having died likewise, his creditors confirmed some of those debts contracted by Sir Alexander, and paid by Mr Murray; and brought an action against the defender, his daughter, heir of entail, to have it found and declared, that the said estate is affectable for payment of those debts.

The defences were, *imo*, That the estate was not at all affectable for the late Sir Alexander Murray's debts, the right in him being of a qualified nature,

No 212. which no creditor of his could carry, otherwise than with the burden of the quality with which it was originally affected.

2do, Supposing Sir Alexander's debts were chargeable on the tailzied estate, by Mr Hugh Murray's accepting the foresaid general disposition, and intermeddling with the effects without inventory, the whole debts of Sir Alexander became thereby extinct.

Answered for the pursuers, to the *first* defence ; That Sir Alexander Murray had neglected to engross *verbatim* in his sasine the prohibitory, irritant, and resolute clauses in the tailzie, contenting himself with a general reference thereto, which was contrary to the express directions of the statute 1685, which provides, That only such tailzies shall be allowed, in which the irritant and resolute clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine. And that if the said provisions shall not be repeated in the rights and conveyances, whereby any of the heirs of tailzie shall brulk and enjoy the tailzied estate, the said omission shall import a contravention of the irritant and resolute clauses, against the person and his heirs, who shall omit to insert the same ; whereby the said estate shall *ipso facto* fall and accresce to the next heir of tailzie, but shall not militate against creditors, and other singular successors, &c.

In terms of which clause, it is absolutely requisite to the very being and original constitution of any entail, that such clauses be inserted in all and each of the procuratories of resignation, charters, precepts, and instruments of sasine. That the intention of the law was manifestly to give force only to such entails, wherein the statute was strictly observed, and to secure the interest of creditors against all tailzies which were not constituted in the precise form and manner therein prescribed ; and the proviso in the act does plainly relate to the original constitution of the entail, whether in the person of the disponent, if resignation is made in his favours, or in the person of the donee, or heir institute. Further, if the former practice of extending the precepts on a paper a-part were still practised, it would have been a good objection against Sir Alexander's precept, that it did not contain the said clauses *verbatim*, in terms of the above act ; but the pursuers have no occasion to argue the point so high ; because, in every view, it must be apparent, that at any rate these clauses behoved to be repeated, not only in the title-deed, but also in the instrument of sasine ; which not having been observed by Sir Alexander Murray, this entail cannot be allowed to the creditors, whatever effect it might have had towards forfeiting Sir Alexander's right to the estate, had that been quarrelled. And it is impossible to plead, with any colour of argument, that a general reference in the instrument of sasine to the irritant clauses, as contained in a separate deed, is the inserting of these clauses in the sasine itself ; because, the question at present is not, What the Legislature ought to have deemed a sufficient interpellation to creditors contracting with the person who stood so infest, in which there may be various opinions ? But singly, What is the direction of the statute in this

particular? And as the law has *in terminis* required, that these clauses should be inserted, not only in the charter and procuratory of resignation, but also in the instrument of sasine; unless the defender can say, that these were so inserted, she can say nothing to the purpose.

To the *second* defence it was *answered*; That the general disposition by Sir Alexander to Mr Hugh Murray, and his acceptance thereof, could not possibly infer an universal passive title; he was not made thereby personally liable for all Sir Alexander's debts, though the right itself was burdened therewith. No doubt Mr Murray was bound to apply the proceeds thereof, towards payment *pro tanto* of Sir Alexander's debts; and in this case, the creditors are able to show that he actually paid much more of Sir Alexander's debts than he received; and in so far Mr Murray became a proper creditor to Sir Alexander; and in that view, no doubt, took conveyances and assignations from most of the creditors, instead of discharges; and it is likewise upon the supposition the fact is so, that the pursuers, as creditors to Mr Murray, have brought this action of recourse against the tailzied estate. See 28th July, Viscount Garnock. See APPENDIX.

Replied for the defender; That though the act 1685 required the several provisions should be repeated in the investiture of every heir who bruits in virtue of an entail, yet it was neither necessary, by the words of the act, nor agreeable to the practice which has followed upon it, to insert *verbatim* the several provisions in every part of each investiture. If these clauses are once insert *verbatim* in one part of the investiture, it is sufficient if the other parts of the investiture contain a reference in general to the conditions and irritancies, fully recited in the preceding part. Thus, if they are *verbatim* engrossed in the procuratory of resignation, it is sufficient, if in the charter, precept, or instrument of sasine, they are brought in by way of general reference; and when they are insert in that manner, it is certainly no stretch to say, that they are insert in the charter, precept, or instrument, although possibly they are not fully recited. And that this is the true sense and meaning of the act, is evident from the last clause thereof, which provides, "That the omission to insert these clauses, shall import a contravention against the heir, &c." If the act were to be understood in the sense of the creditors pursuers, the consequence would be, at one blow to strike off the greatest part of the tailzies in Scotland, since it is well known that the usual practice is to engross them *ad longum* in the dispositive clause, and to insert them in the procuratory and precept only by a general reference. And it is observable, that if, by the words of the act, it is absolutely necessary that the clauses should be insert *verbatim* in the instrument of sasine, by the same words it is equally necessary, that they should likewise be insert *verbatim* in the procuratory and precept.

Replied to the answer to the *second* defence; That the disposition by Sir Alexander to Mr Murray, was burdened with the granter's debts, consequently Mr Murray's acceptance thereof must subject him thereto. The acceptance of

No 212.

a disposition, with the burden of the granter's debts, is a known common passive title; and has the same effect as if the acceptor were served heir to him. The only expedient that the receiver of such a disposition has to relieve himself of the universal passive title, and to secure his being only liable to the extent of the subjects conveyed, intromitted with by him, is to confirm himself executor-creditor, upon the warrantice of the disposition expressed or implied. Such management exempts the disponent from all suspicion of fraud, and affords to the creditors of the defunct an easy charge against him, to operate their payment to the extent of his intromissions; but where he omits to confirm, and inventory the subjects intromitted with by him, he is understood to take his hazard of the effects answering the debts; so that if he should not make good so much of the effects as would answer the debt, he must, notwithstanding, satisfy the whole. And it is most just it should be so, since he did not follow the legal and ordinary precaution, by confirming the subjects, and thereby save himself from being further liable than to the extent, and furnish the creditors with a rule of charge against him, on the inventories of the same. Now, in the present case, Mr Murray, without confirming, or inventorying the effects, intermeddled with the same *per aversionem*, consequently he became universally liable to the Creditors of Sir Alexander Murray; and the debts paid by him, in consequence of his being so liable, became for ever extinct. See the act 12th Parl. 1617, touching the long prescription, and the cases of the Lady Little Cessnock 1718, and 2d February 1728, Lord Strathnaver. See APPENDIX.

THE LORDS found, That Sir Alexander Murray not having repeated the irritant, prohibitory, and resolute clauses of the entail in the sasine, upon which he bruiked the estate, otherwise than by a general reference, the debts contracted by him may be charged upon the entailed estate. And further found, That Mr Hugh Murray, by the conception of the disposition founded on, granted to him by Sir Alexander Murray, of his effects, was not obliged to pay the debts of the granter, beyond the value of the subjects disposed. See TAILZIE.

G. Home, No 269. p. 432.

*** See Kilkerran's report of this case, *voce* TAILZIE.

No 213.

1745. June 6.

MERCER against SCOTLAND.

A PERSON, passing by his brother and heir at law, disposed to his sister, and her heirs, all debts owing to him, heritable and moveable, and all his estate, goods, and gear, which should belong to him at the time of his death; with this *proviso*, That the right, and every person who should claim thereby, should be burdened with the payment of all his just and lawful debts; and he reserved a power to alter at any time in his life. After the death of the disponent, an

only son of the sister having served himself heir of provision in general, it came to be questioned between him and a creditor of the disposer, Whether or not he was universally liable upon the clause burdening him with payment of the disposer's debts? It was admitted, that such burdens in dispositions to particular subjects were understood as only intended for the security of creditors; but it was *argued*, That the acceptance of a man's whole estate under a general conveyance, must infer an universal passive title. THE LORDS found, That as the defender was not *alioqui successurus*, he was not universally liable, but *tantum in valorem* of the subjects disposed.

Fol. Dic. v. 4. p. 45. Kilkerran.

*** This case is No 119. p. 9786.

1752. June 30.

ANNANDALE against BROWN.

No 214.

DAVID ANNANDALE merchant in Edinburgh, settled the liferent of a house on Christian Key his wife, in the event of her surviving him, and also executed in her favour a disposition of his moveables, expressly burdened with payment of all his debts. After his death, Key intromitted universally with his moveables, yet so, that after payment of the privileged debts due by the deceased, her superintromissions appeared not to have exceeded L. 2 Sterling.

Key the widow was afterwards married to Peter Brown wig-maker in Edinburgh, the defender, and they, during the existence of the marriage, paid to Priscilla Handaside the sum of L. 50 Sterling, which the deceased Annandale owed her by bond. Instead of taking receipt for that sum, they made Handaside grant an assignation of it to a trustee for their use. In consequence of this assignation, the trustee adjudged the house above mentioned which had belonged to Annandale.

After the death of Key, William Annandale the pursuer, brother and heir of David Annandale, having raised a reduction of the assignation, and of the adjudication which followed upon it, *pleaded*, That, as Key, by her acceptance of the disposition made in her favour by her husband Annandale, became burdened with the payment of all his debts, she and Brown her second husband must be understood to have paid Handaside's debt in compliance with this obligation; and that debt, being thus extinguished, cannot now subsist in the person of Brown, (who derives right from Key) so as to affect the heritage of Annandale.

Answered for the defender Brown; Although action had been brought against Key herself, she would not have been burdened in consequence of the disposition by her first husband beyond the amount of the subjects with which she intromitted, as was found in the case Thomson against the Creditors of Thin; 28th December 1675, observed by Stair, No 6. p. 3593. Action indeed lay.

A person disposed to his wife the whole moveables, with the burden of his debts, and settled the liferent of a house on her. Having paid privileged debts, nearly to the extent of the moveable; she took an assignation in name of a trustee, to a debt of L. 50, upon which she adjudged the house. Found entitled to do so.

No 214.

against her as vicious intromitter, but it could not in law have affected her husband, might have been avoided by her confirmation, was extinguished by her death, and in no event would have benefited the pursuer, who is not creditor, but heir of Annandale.

"THE LORDS repelled the reasons of reduction, and found that the defender was entitled to take an assignation to the bond in his own, or in a trustee's name."

Reporter, *Justice-Clerk*. Act. *A. Pringle*. Alt. *Ferguson*. Clerk, *Murray*.

D. *Fol. Dic. v. 4. p. 45. Fac. Col. No 18. p. 36.*

1757. December 14.

JOHN WATSON, Writer in Edinburgh, against JEAN ERSKINE.

No 215.

A relict intromitting with her husband's effects in virtue of a general disposition, found liable only for actual intromissions.

ROBERT MEEK brewer in Dalkeith, by deed, bearing date 9th April 1739, "For love and favour to Jean Erskine his spouse, and for the better enabling her to make payment of such debts as should be resting by him at his death, and defraying the expences of his last sickness and funerals," conveyed to her, in general, all his moveable effects, of whatever kind; and, in particular, without prejudice to the said generality, he assigned to her a list of debts due to him by many different people, which are therein specially enumerated. This deed contains also the following clause. "Declaring always, as it is hereby expressly declared, That the said Jean Erskine shall be bound and obliged to account to Patrick and Thomas Meeks, our children, for two thirds of the surplus, if any be, of the sums and subjects hereby conveyed, after payment of my just and lawful debts, and funeral-charges; and in case the said debts funerals, and other expenses, shall exceed the moveables hereby assigned, the said Jean Erskine is to be no further liable than for what she shall receive by virtue of this right and assignation."

Robert Meek died within a few weeks after granting this deed; and the said Jean Erskine, his relict, in virtue of the conveyance in her favour, intromitted with his moveable subjects, and recovered part of the debts assigned to her. The remainder of them she alleged were old and desperate, and not worth doing diligence upon.

In the year 1740, John Watson writer in Edinburgh, a creditor of Robert Meek, obtained decret in absence, before the Sheriff of Edinburgh, against the said Jean Erskine, as representing her husband, without any proof of the passive titles, other than holding her as confessed; and upon this decret he first led an adjudication, and thereafter proceeded to point the moveable effects of the defunct which were in her possession.

In 1743, Jean Erskine raised a reduction of that decret; but the process was not properly insisted in till the year 1755; when it was urged for her, as a

sufficient ground of reduction of the Sheriff's decret, That it was in absence, and without proof of the passive titles ; and that she noways represented the said Robert Meek, her husband, excepting that she had got a disposition and assignation of certain moveable debts from him, by which it was expressly declared, that she should be no further liable, than for what she should receive in virtue of the said assignation ; upon which she was willing to account. And having exhibited an account of her intromissions with her husband's effects, she *insisted*, That she could not be further liable for her husband's debts than to the extent of her actual intromission. Having been reponed to her oath, upon the passive titles, she accordingly deponed, and acknowledged certain intromissions with the effects of her husband, in virtue of the foresaid assignation ; but no other passive title.

THE LORD ORDINARY, by his interlocutor, 21st of February 1756, " Having considered the disposition, with the pursuer's oath, found her accountable only *in valorem* of the effects of her husband, which she has acknowledged she has intromitted with."

John Watson reclaimed against this interlocutor, and *pleaded*, That the general rule of law was, That those who intromit with a debtor's effects, upon a title of possession sufficient to exclude others, are themselves bound to possess and intromit, and to do diligence for recovery of the debts and effects *debito tempore*, so that they may not perish by neglect, to the loss of lawful creditors : That this rule obtained with respect to executors, who are the trustees of the law, and upon whom the inventory is a check against embezzlements ; and there was no reason why an universal dispositive, against whom there is no such security, should be more favoured : That he did not insist, that the pursuer should be universally liable for her husband's debts, as having accepted of a general disposition ; though such was formerly the law of this country ; 3d December 1678, Wamphrie against Johnston, (*see* APPENDIX) ; but only that she should either be liable *in valorem* of the particular debts specially assigned to her, or should show, that she did exact diligence for recovering the same : That it would be a very easy method of disappointing creditors, if a debtor were allowed, by a deed *mortis causa*, to convey his whole subjects to his wife or children, declaring, that they shall only be liable for what they actually receive, of which there could often be no other evidence but their oaths ; so that they may embezzle as much as they please, without remedy, when it is in their power to take possession of all he leaves behind him, to the exclusion of his creditors : That the law does not allow a debtor so great a liberty of making his heirs liable for his debts or not just as they please ; nor was it in the power of any person to hurt his creditors, by adjecting such a clause to a deed, declaring, That his heirs or dispositivees should only be liable for what they received of his debts or effects.

Answered for the pursuer, The rigour of our ancient law, as to penal passive titles, is now happily softened ; and by a long train of decisions, it is now esta-

No 214. blished, That any colourable title is relevant to elide the passive titles; and that even a general disposition of moveables, though without confirmation, is sufficient to defend against vitious intromission. If there is no pretence for subjecting the pursuer to an universal passive title, neither can she be liable farther than *in valorem* of her intromissions, when, by the express conception of that deed which was the title of her intromission, she is declared to be accountable only for what she should intromit with. There is no medium between these two extremes, of being universally liable, or liable only *in valorem* of the actual intromissions; unless something special could be alleged, from the tenor of the writing under which she intromitted, which obliged her to exact diligence, and, *in panam* of her neglect, made her answerable for the whole debts. The pursuer was not in this case to be considered as trustee for the creditors, and as such bound to exact diligence; she was assignee for behoof of herself and children, *quoad* the surplus value of the subjects, after payment of the debts; and it would have been highly unjust to have subjected her to the necessity of doing exact diligence, which, as to many of the debts, could have been of no use, though it must have required a great expense. Her right did not bar the defender from having access to the funds themselves. He might have confirmed himself executor-creditor, and would thereby have been preferable to her. But although he first adjudged, and then pointed most rigorously, yet he considered any further diligence as to no purpose; and having left the pursuer to make the best she could of these old debts, under the title of her assignation, she can only be accountable for what she actually recovered in terms of that deed.

"THE LORDS adhered."

Act. Lockhart.

G. C.

Fol. Dic. v. 4. p. 45. Fac. Col. No 67. p. 113.

1770. December 12.

ANNE MARTIN, Spouse to JAMES MARNOCH, Pursuer, against JAMES GRAHAME in Livingston's Yards, Defender.

No 215.

Passive title, if incurred by accepting a general disposition, burdened with payment of debts.

IN 1764, the succession to the estate of Mulderg opened to Mrs M'Culloch, who had that year executed a disposition of all her heritable and moveable estate, and, particularly, an adjudication of the estate of Mulderg, for L. 10,186 Scots, in favour of James Grahame, her cousin, reserving her own liferent of the premises, and a power and faculty, at any time in her life, *etiam in articulo mortis*, to bequeath or devise L. 200 Sterling, by a writing under her hand, to any person she might think fit; declaring also, that these presents were granted and accepted by the said James Grahame, under burden of the payment of all her just debts, and of the said sum of L. 200, if the faculty should be exercised.

Mrs M'Culloch had been under obligations to the pursuer ; and, on the 29th October 1764, she granted a bond, binding and obliging ' her heirs, executors, and successors, at and against the term of Martinmas 1765, to pay to the said Anne Martin, for her liferent use, and to the said William Marnoch, his heirs and assignees in fee, the sum of L. 50 Sterling, with L. 10 penalty, in case of failzie.'

In December 1764, Mrs M'Culloch executed another disposition, whereby she conveyed to James Grahame the adjudication which she held over the estate of Mulderg, reserving her own liferent, and discharging the faculty to bequeath L. 200, in so far as concerned the said adjudication, &c. Mrs M'Culloch having soon thereafter died, James Grahame disposed of her household-furniture, and intromitted with what effects she left ; and the pursuer having brought an action against him, as representing Mrs M'Culloch, for payment of sundry bills accepted by her for cash, &c. furnished her, and for payment of the bond for L. 50, Mr Grahame at first denied the passive titles, but at length allowed decret to pass against him for the bills.

As to the conclusion for payment of the bond, the Lord Ordinary, upon advising memorials, pronounced an interlocutor, finding, " That the defender having accepted of a general disposition from the deceased Margaret M'Culloch, of all her heritable and moveable subjects, pertaining, or that shall pertain to her at the time of her decease, under a reserved power to bequeath and devise the sum of L. 200 Sterling to any person she might think fit, and under the burden of all her just and lawful debts, contracted, or to be contracted, is bound to pay the sum of L. 50 Sterling, contained in a bond thereafter granted by the said defunct to the pursuer, Anne Martin, in liferent, and to William Marnoch, her son, in fee, with annualrents and penalty, in terms of the said bond."

In a reclaiming petition, James Grahame *pleaded*,

That he ought not to be personally liable in payment of this bond ; for, as he had not hitherto taken any benefit from the disposition mentioned, he could not be held as having accepted of it, so as to subject him in a passive title, or bind him personally to pay the grantor's debts. As in this case, he had only accepted a disposition to a particular subject, burdened with debts and a reserved power, he, of course, represented the grantor only in the subject disposed ; and hence he did not thereby incur an universal representation, nor could be further liable than *in va'orem* of that subject. He was precisely in a case similar to that of an executor confirmed, who was not allowed to be distressed beyond the amount of the inventory ; Dictionary, *voce* DILIGENCE ; or to that of an heir served *cum beneficio inventorii*, liable only to the value of the heritage given up ; Stair, 8th December 1675, Thomson *contra* Creditors of Thin, No 6. p. 3593. ; 2d December 1662, Clerk *contra* Clerk, No 207. p. 9887. ; 28th November 1738, Creditors of Crichen, No 17. p. 5348. As an heir *cum beneficio* could not be personally decerned against beyond his intromissions, so

No 215. neither should he in the present instance ; and all that could be demanded of him was, that he should grant an assignation to the adjudication, in terms of the conveyance in his own favour.

The pursuer *answered*,

The petitioner's doctrine, that he could not be found personally liable for this bond, would overturn the doctrine of the law as to passive representation altogether ; for, upon the same principles, no one who succeeded to an estate would be bound to pay his predecessor's debts, till he had intromitted with as much of the rents as was sufficient for all demands, or had, at a distance of time thereafter, sold the estate for that purpose. The argument drawn from the situation of executors-creditors and heirs entered *cum beneficio inventarii*, could not aid the question ; the rules, as to these, were introduced for the benefit of the creditors ; it would be hard to make them personally liable where they had not intromitted ; but this had no resemblance to the case of the petitioner, who, knowing his risk, had willingly accepted a disposition, with all the burdens it contained.

It was agreed upon the Bench, That the acceptance of a disposition, under the burden of debts, &c. created a passive title ; but as the rigour of passive titles was now much relaxed, a doubt was entertained, if the defender could be made liable *ultra valorem* of his intromission. As these were not fully explained, a remit was made to the Lord Ordinary, to hear parties farther thereon.

Lord Ordinary, *Pitfour*.

For Martin, *S. Fraser*.

For Grahame, *Rae*.

Clerk, *Kilpatrick*.

R. H.

Fac. Col. No 58. p. 172.

Bona fide, intromission with the effects of a defunct. *See BONA ET MALA FIDES.*

Disposition to the apparent heir reserving the granter's liferent, and a power to alter, if it will infer a passive title against the disponent. *See FACULTY.*

Penal passive titles, *an transeunt in hæredes ?* *See PERSONAL and TRANSMISSIBLE.*

Disposition to the heir, *post contractum debitum*, if probative of its onerous cause. *See PROOF.*

Intromission by tutors, if it will make a passive title against the pupil. *See TUTOR and PUPIL.*

See APPENDIX.

P A T R O N A G E.

S E C T. I.

Nature and Extent of the Right.

1630. *March.* BISHOP OF DUNKELD *against* LORD BALMERINOC.

THE Bishop of Dunkeld pursues the Lord Balmerinoc for reduction of the infestment of the patronage of the kirk of Cramond, granted to his father by the King, by resignation of the said kirk in the King's hands by Peter, Bishop of Dunkeld, with consent of the Chapter, for two reasons; *1mo*, Because the said kirk was a mensal-kirk, pertaining to the patronage of the bishoprick, which, by the law, both civil and canon, cannot be disposed from the bishoprick; *2do*, The resignation was not subscribed by the most part of the Chapter living for the time. To the *first* reason, That the Bishop had no interest to pursue this action of reduction, because this kirk was disposed from the bishoprick by the resignation, and the King's disposition of the patronage thereof to the defender's father, and the said infestment ratified in Parliament, wherein the Bishops were restored *in anno* 1606, wherein such dispositions of patronages, made by the lawful titulars and the King's Majesty, and ratified in Parliament, were specially excepted; to which it was *replied*, That the exception contained in the act of Parliament was to be understood only of patronages of kirks, whereof the presentation pertains to the Bishops, and not of their mensal-kirks.—THE LORDS assolized from the first reason.

No 1.

The exception in the act 1606, restoring Bishops, was found to be understood of patronages, as well of mensal-kirks, as of those of which the presentation belonged to the Bishop.

Fol. Dic. v. 2. p. 49. Auchinleck, MS. p. 116.

* * * Durie reports this case.

No 1.

1631. *March 25.*—In a reduction of a right of the patronage of the parsonage teinds of the kirk of Cramond, made by the King's Majesty to this Lord Balmerino's father, upon resignation of these teinds made by Mr Peter Rollock, Bishop of Dunkeld; of the which bishoprick the said kirk of Cramond was a proper patrimonial kirk, and the Bishop was not patron thereof, but the same was a mensal-kirk, pertaining to him; the reason was, that the mensal-kirks could not be disposed, and that there was no dissolution thereof in Parliament from the bishoprick, and that the resignation thereof made by the Bishop was not done with the consent of the most part of the Chapter, which was necessarily required thereto, and without which it could not be necessarily disposed. And the defender *alleging*, That his right of the patronage of this kirk could not be quarrelled; because, in the 2d act, Parliament 1606, whereby the Bishops are restored, special exception is made of patronages of kirks pertaining to Bishops, disposed by lawful titulars, and confirmed in Parliament; and this kirk of Cramond was resigned, as said is, by Bishop Rollock, being then lawful titular, in the King's Majesty's hands, and thereupon the presentation and patronage thereof were disposed to the Lord Balmerino by the King, which was ratified in the same Parliament 1606, and declared then by the Estates to be reducible upon no ground or cause, at no time thereafter. And the pursuer *answering*, That that exception extended only to patronages of kirks, which patronages were at Bishops' presentation, and not to the kirks pertaining in patrimony to Bishops, as this kirk libelled, which was not a kirk at the Bishop's presentation, but his own proper mensal-kirk, and so fell not under the exception; and, further, albeit the exception might extend thereto, yet that exception must be understood of kirks lawfully disposed, and makes not dispositions, which were not lawful, to become valid, if they were invalid, or had nullities before the confirmation; *nam confirmatio nihil novi juris tribuit*; likeas the act in that same Parliament, *Salvo jure cujuslibet*, gives warrant to parties having interest to claim their rights, notwithstanding of any act done in that Parliament, to any private person's prejudice; and by act of Parliament 1617, James VI. it is appointed, that the Lords of Session may judge upon writs ratified in Parliament, which they could not do, if that the confirmation supplied the defects and nullities thereof. THE LORDS found, that this exception extended to kirks pertaining to the patrimony of Bishops, which were so ratified in Parliament, as the exception requires, as well as to kirks at Bishops' presentation, without distinction; and also concerning the nullity of the right, alleged confirmed in Parliament, if the confirmation excluded the party to propone any nullity or not; they found, that, in respect of the act of Parliament, which declares the Lord Balmerino's right to be irreducible thereafter, *ut supra*, they found the said right

to be good, notwithstanding of the reason libelled, founded upon the said nullity, in respect of the tenor of the said act of Parliament; but the Bishop desired to be further heard herein.

No 1.

Clerk, Hay.

Durie, p. 585.

1630. March 9. MR WALTER WHITEFORD *against* Sir JAMES CLELAND.

MR WALTER WHITEFORD being presented by the King to the Sub-deanry of Glasgow, together with the kirks of Calder and Monkland, that were parts of the Sub-deanry, sought letters conform. *Alleged* by Sir James Cleland, No letters conform upon the kirks of Calder and Monkland; because he and his author, the Earl of Haddington, were infeft in the patronage of the said two kirks, by two public infeftments, to which Mr Patrick Walkingshaw, Sub-dean for the time, consented; and so his infeftment, being conform to the 172d act of Parliament 1593, is valid. *Replied*, That ought to be repelled; because, the act 1593 is only extended to the patronage of kirks pertaining to the King; but the King was not patron of these two kirks, but of the Sub-deanry, whereof these kirks are parts and pertinents; and as the King could not have presented persons to these kirks, except they had been first dismembered from the Sub-deanry, and erected in several patronages, no more can he by infeftment dispose the patronages of them, except they had been dismembered from the Sub-deanry, which they never were. *Duplied*, These kirks needed not to have been dismembered from the Sub-deanry; because, the time of infeftment given to the defender's author, they were the whole Sub-deanry, the temporality being annexed to the Crown, and the spirituality consisting of these kirks allenarly. *Triplied*, These kirks were not then the whole Sub-deanry, but parts thereof, because the Sub-deanry is a title and dignity of the Chapter, distinct from these kirks, which remained at that time unsuppressed, otherwise it could never have revived, except it had been of new erected; but in 1617, the temporality is restored to the Chapters, which importeth that the Chapters were then standing unextinguished.—THE LORDS repelled the exception, and granted letters conform to these two kirks, as well as to the Sub-deanry.

No 2.
Presentation
to a sub-
deanry.

Spottiswood, (PATRONATUS, &c.) p. 227.

* * * Durie reports this case.

MR WALTER WHITEFORD being provided, by the King's presentation, to the benefice of the Sub-deanry of Glasgow, and seeking letters conform thereto, and to be answered of the fruits of the benefice, and specially of the fruits of

No 2.

the kirks of Calder and Monkland, which were the only two kirks, and the sole patrimony of the benefice, except some few lands, feued for a small duty, whereof there was no benefit; compeared Sir James Cleland, and *alleged*, That this presentation by the King could not be sustained as a right, whereupon letters conform should be granted for the fruits of these two kirks; because, the right of presentation of these two kirks was disposed long before to the E. of Melross, who was infeft therein by the King's Majesty; to the which right Mr Patrick Walkingshaw, then Sub-dean and titular, consented, conform to the 172d act of Parliament 1593; likeas, Sir James, upon the Earl of Melross his resignation, was infeft in the same, and had presented persons to the kirk, who ought to be answered of the fruits of these two kirks, and not this pursuer, as presented to the Sub-deanry; for he *alleged*, That, if the Sub-deanry consisted of these two kirks only, as he alleged it did indeed, when the Earl of Melross acquired the same, *viz.* after the year 1587, at which time the kirklands of the kingdom were all annexed to the Crown, then his right of presentation behoved to extend to the Sub-deanry, the whole parts thereof, *viz.* the two kirks falling under the same, *quia partes integrantes faciunt totum*; and if the dignity of the Sub-deanry comprehended any other than these two kirks, he was content that the pursuer should have the same, but for the fruits of these two kirks, disposed in patronage before, as said is, as presented to the Sub-deanry, he could not have the same; for, albeit chapters and dignities of chapter-kirks were restored, yet it was with the exception of rights of patronage, and other rights lawfully acquired, and this excepted one was so; *Ergo, &c.* And the pursuer *contending*, That the right of patronage of these two kirks disposed, as said is, to Sir James Cleland, was not valid in law, seeing the same being incorporated, and making up the Sub-deanry, they could not be disposed by the King, upon the Sub-dean's consent, except they had been first dissolved from the Sub-deanry, or else that the patronage of the Sub-deanry had been expressly disposed by the King; for the King had no right ever of the patronage of these two kirks, as several Rectories, but only the patronage of the Sub-deanry, which comprehended these kirks; so that the 172d act of Parliament 1593, anent the titular's consent, had no affinity with the case libelled; for that act is only for patronages of several kirks and rectories, which were at the King's presentation before, and these kirks were never at the King's presentation; and so he *replied*, That the right of patronage could not stay letters conform:—THE LORDS found this reply relevant, and that the two infeftments of patronages of these two kirks could not hinder letters conform; but that the Sub-dean, presented by the King, ought to be answered of the fruit of these two kirks, and not the persons presented by Sir James to the said two kirks, in respect the same were not particularly dissolved, nor dismembered from the benefice of the Sub-deanry; neither was it found to be.

sustained, albeit having the Sub-dean's consent ; and so, in this judgment of letters conform, the said two heritable rights were everted.

No 2.

Act. *Advocatur.*Alt. *Nicolson & Aiton.*Clerk, *Gibson.**Duric, p. 502.*

1632. —. The L. of LUGTON *against* The L. of EDMONDSTON.

THE Laird of Lugton having comprised from the Laird of Ednam the patronage of Ednam Hospital, presents thereunto a Preceptor, from whom he takes an infeftment of the lands of Fallow, holding of the preceptory in James Pringle of Buckholme's name, and upon his infeftment pursues the tenants for their mails and duties. *Alleged*, They were tenants, at least possessed by tolerance of one Brakenrig, who was lawfully provided to the said preceptory by umquhile Andrew Laird of Edmondston, and by virtue thereof in possession 25 years. *Replied*, Any presentation Brakenrig had was null, in respect that no collation nor institution followed thereupon, which is necessary in all benefices ; *2do*, It never came in Brakenrig's hands, but remained still with the Laird of Edmondston in his charter-chest, where it was yet lying, neither had ever Brakenrig done any deed as Preceptor, or was acknowledged for such. *Duplied, 1mo*, No necessity of collation ; because not a benefice of cure ; *2do*, Sufficient that the presentation was lawfully subscribed by the patron ; and the defenders offered to prove, that Brakenrig was ever since in possession of a duty of 20 merks yearly from Edmondston. *Answered* to this last part, Not relevant ; unless it were alleged, that these 20 merks were paid by virtue of some right (either feu or tack) set to Edmondston by Brakenrig ; especially since the pursuer offered to prove, that Brakenrig paid all that time mail and duty to Edmondston himself.—THE LORDS repelled the exception, in respect of the second part of the reply, except the defenders would allege that duty of 20 merks to have been paid for some right made to Edmondston by Brakenrig. And for the first part of the reply, anent the wanting of collation, they passed it over, and gave it not an answer.—1632. December 11.—Next *alleged*, They were tenants to Sir John Stirling, who was infeft by Brakenrig, and by virtue thereof in possession. *Replied*, His infeftment was null, as proceeding *a non habente potestatem* ; Brakenrig's right being found null for the cause foresaid. *Duplied*, The cause why Brakenrig's right was not found good, was because he had never done any deed as Preceptor, which now could not be said, he having given the infeftment foresaid. *Triplied*, That the infeftment could not sustain his right ; because, after the pursuer's, which was given by a Preceptor lawfully provided, and no alleged possession of Brakenrig's, after the lawful provision of another, could make his null right valid.—THE LORDS.

No 3.

Presentation
of a preceptor
to an hos-
pital.

- No 3. repelled this allegiance also and duply, in respect of the reply and triply.—
3tio, Sir John Stirling, who was present, offered to satisfy the pursuer of all his sums he had comprised for, whereby his interest to quarrel his infeftment would be taken away. The pursuer *alleged*, His comprising could not be redeemed *hoc ordine*, especially the defender having no right to redeem. *Replied*, He offered it in name of Ednam, from whom the pursuer had comprised. *Duplied*, He had comprised only from Ednam the right of patronage, which was the most could be redeemed from him; but as to his infeftment given him by the Preceptor he had presented, the Laird of Ednam had no right to redeem that, because he could pretend no right to these lands himself, they being provided by his grandfather to the children of his second marriage.—
 THE LORDS would not sustain this offer at the defender's instance.

Spottiswood, (Kirkmen, &c.) p. 192.

* * * Durie reports this case.

ONE having comprised from the Laird of Edmondston, as lawfully charged to enter heir for his father's debt, the right of the patronage of the Hospital of Ednamspittal, which pertained to the house of Edmondston, with other lands of Ednam comprised also; and thereafter the compriser having presented a Preceptor to that Hospital, which Preceptor immediately thereafter sets a feu, with consent of the said compriser, who was patron by virtue of his comprising, of the lands of Falla, which pertains and were doted to the said Hospital, to another person, for payment of a certain duty to the said Preceptor; which feuar, so infeft, pursuing the tenants to remove from the said lands, who *excepted*, That they were tenants to such a Preceptor yet alive, who was presented 25 or 30 years since to the said preceptory, by umquhile the Laird of Edmondston, goodsire to this now Laird, and which Preceptor had been these 25 years in possession of the said lands, by receiving of 20 merks from the possessors of the same lands, as duty therefor, and yet continues in possession thereof; so that this Preceptor being yet alive, no other Preceptor constituted and presented by the compriser, nor no feuar made by him, can have right to these lands, seeing this comprising, which is the ground of all, is but deduced *in anno* 1631, and so is 25 or 30 years after the other was presented, and who since has continually been in possession; this exception in this judgment possessor of removing was repelled, and not sustained to defend the tenants; for, as it was replied for the pursuer, the LORDS found the right of preceptory, made by the patron, whereupon the exception is proponed, not sufficient to make that person lawful Preceptor, seeing the presentation thereto was not delivered to that Preceptor, but remained still with the patron, and became not the Preceptor's evident; and also seeing the alleged Preceptor was a tenant of a part of the same Hospital-lands, and paid duty therefor himself to the Laird

Edmondston the patron, who presented him: And the LORDS found no defect in the presentation, albeit collation and institution followed not thereon, as was alleged by the pursuer against the excipient's presentation, produced by him; for it was found, there was no necessity of collation nor institution, in such presentations made by laicks, for which *vide* July 4th 1627, M'Kenzie, Minister, See APPENDIX. And it was not respected what the excipient duplied, that there was no necessity now, after so long time, to prove delivery of the Preceptor's presentation, seeing it was extant, and must be presumed to have been delivered; likeas, without delivery, it is sufficient, in respect of the 25 years possession, as said is, seeing in *beneficialibus, decennalis, et triennalis possessio pacifica* is enough, *etiam sine titulo, vel præsunt titulum*, especially the Preceptor being yet living, and in possession, and against another Preceptor so lately presented by this compriser; and the patron's having of the presentation is no impediment, nor the Preceptor's paying duty for a part of the lands; for the patron, upon any condition betwixt him and the Preceptor, might keep this presentation, that it might appear on all occasions requisite, that he had made bargain with one who was Preceptor. Likeas, it is no impediment, but that the patron might suffer the Preceptor to bruik, and pay duty for a part of the land, after that he had covenanted therefor with the Preceptor, and that the same Preceptor had received duty for the rest of the lands belonging thereto: Notwithstanding whereof, the exception and duply were repelled. And thereafter the defender eiking to his exception, that the said Preceptor had set a feu of these lands to another, to the behoof of the L. of Edmondston, whereby he had done all deeds requisite to make a Preceptor; this was sustained, albeit this right was made since the comprising, because the defender offered instantly to pay to the compriser all the sums for the which the comprising was deduced, which was instantly permitted, without necessity to put the party to a redemption.

Act. Stuart.

Alt. Nicolson.

Clerk, Scot.

Durie, p. 657.

1666. July 6.

PARSON of MORHAM *against* LAIRD of BEARFORD and BEINSTOUN.

THE Parson of Morham pursues reduction of a tack set by the former Parson to Bearford and Beinstoun, as being granted without consent of the patron; the defenders *alleged*, Absolvitor; because the tacks were set by the Parson, who had commission from the Earl of Buccleugh, patron, to set tacks; *2do*, The tacks were set with consent of Francis Steuart, Lord Bothwel, expressly, as patron, which Francis Steuart had right to the patronage, in so far as this

No 4.
Patronage is
transmissible
without in-
feftment.

No 4. patronage, with the rest of the estate of Bothwel, being forfeited, the Earls of Buccleugh and Roxburgh got gifts thereof; but, by the King's decreet-arbitral betwixt Francis Steuart and them, Buccleugh was ordained to denude himself of this patronage, and others, in favour of this Francis. The pursuer *answered*, *first*, That no commission, granted by the patron to the Parson himself, could be sufficient; because, the intent of the act of Parliament, requiring the consent of patrons, was not for any advantage or interest of the patron, to his own behoof, but to the behoof of the benefice, that the incumbent might meliorate the same; and so the patron was, by his right of patronage, as curator *Ecclesiæ*; but curators cannot authorise their minors by commission, at least the patron cannot give commission to the beneficed Parson himself, no more than he could renounce the benefit of the act of Parliament, and leave the Parson to himself; *2do*, Before the tack was set, the Earl of Buccleugh, granter of the commission, was dead, *et morte mandatoris perimitur mandatum*. As for Francis Steuart's consent, he was not patron, not being infest; but the King's decreet-arbitral imported only a personal obligation for Buccleugh to denude; so that if Buccleugh thereafter should have consented to another tack, that would have been preferred,

THE LORDS found that member of the allegiance of Buccleugh's being dead before the tack, not relevant to annul the same, as depending on his commission; but decided not the first point, whether commission could be granted by the patron to the Parson himself; but found the last member relevant to defend the tack; for the right of patronage being *jus incorporale*, might be transmitted by disposition, without infestment; and albeit Buccleugh was not formerly denuded, even by disposition, so that if he had consented to another right, that, as more formal, would have been preferred; yet, there being no competition, the Parson cannot quarrel the want of the patron's consent upon that ground.

Fol. Dic. v. 2. p. 48. Stair, v. 1. p. 390.

* * * Dirleton reports this case.

1666. *July 19.*—THE Minister of Morham having pursued a reduction of a tack set by his predecessor, upon that ground, that it was above three years, without consent of the Earl of Buccleugh, patron for the time; the tack was sustained, in respect Francis Steuart had consented, in whose favour Buccleugh, by a decreet-arbitral, was obliged to denude himself of the patronage.

This decision seemeth to be hard, seeing Buccleugh was full patron, and was not denuded by the said decreet; and the right of the patronage might either have been comprised from him, or disposed by him effectually, notwithstanding of the said decreet, which did not settle the right of the patronage in the said Francis his person, but was only the ground of a personal action

against Buccleugh, for denuding him of the right of the patronage; and as Francis could not present, so he could not consent as patron to tacks. Upon these considerations, diverse of the Lords were of the contrary opinion.

No 4.

Dirleton, No 25. p. 11.

* * A similar decision was pronounced, 5th July 1632, Sheriff of Forrest against Town of Selkirk, No 4. p. 6886. *voce* INFECTMENT.

1677. *January 24.*

The LAIRD OF INNERNYTIE *against* Mr WILLIAM NAIRN, Minister of Capoch.

No 5.

A patron granted a presentation to a man, and, after his death, to his son. Found, that the presentation was ineffectual *quoad* the son's right, after the patron's death.

In a double poinding, raised at the instance of the Tenants of Russil, who were pursued for their duties by the said parties, it was *alleged* for Mr William Nairn, That he ought to be preferred; because, after the death of Sir William Stewart, who was Prebend, presented *in anno* 1664, he had a right from the Bishop of Dunkeld to the said prebendary, and rents thereof. It was *answered* and *alleged* for Innernytie, That, notwithstanding, he ought to be preferred; because, the gift and presentation, granted *in anno* 1664, which was long prior to the Minister's right, was not only made to his father, but, failing of him by decease, to his son, who now pursues; and, by virtue thereof, his father did possess, during his lifetime, and the Innernyties since his decease, and so had the benefit of a possessory judgment; but, albeit they were contending upon right, yet they ought to have preference; because the Bishop, who granted their right, being undoubted patron of the prebendary, which was not a benefice of cure, being neither a collegiate kirk, nor liable to any ecclesiastical service, the Bishop, as he might have granted a joint right to the father and son, and longest liver of them two, so he might lawfully grant a right to the father during his life, and, failing of him by decease, to his son, as is ordinary to all Bishops to grant a right of the Clerk's office of Commissaries to father and sons; likeas, the King, as patron of the Chapel Royal, doth grant such right to laick persons, neither can this be called a dilapidation of the benefice, in prejudice of the Bishop's successors, seeing they have only *nudum jus presentandi*, and do not thereby take away any of the rents of the benefice. It was *replied* for the Minister, That, notwithstanding, he ought to be preferred; because, after the death of Sir William Stewart, the benefice was then vacant, and his son, having only possessed by the space of three years since, cannot crave the benefit of a possessory judgment; as if his father had been only liferenter, and he fiar, and so might make use of his possession, to defend as in a possessory judgment, seeing his father had a full right, by his presentation, to the whole benefice, and the son had no pretence of right but by sub

No 5.

stitution, which can never defend him, seeing that were undoubtedly to dilapidate the benefice, in prejudice of the Bishop's successor, who, upon decease, or vacancy by demission, hath a full right to grant a new presentation; and the act of Parliament, against dilapidation of benefices, hath no such exception; and, if it were otherwise, a present Bishop might substitute twenty persons to one another, and might prejudice all his successors; and for the rights granted to Commissary Clerks, it cannot be obtruded; because, that is only an office of Court, and profits arising from personal service; neither can presentations granted by the King to prebendaries of the Chapel Royal to laick persons.—THE LORDS did consider this presentation, and finding that Innernytie's right was only by a substitution, failing of his father by decease, which the law doth not allow, seeing thereby all succeeding Bishops might be prejudged of the benefit of presentation, which is a part of the right of a bishoprick, albeit it was not a benefice of cure; they did prefer the Minister; and likewise found, that Innernytie could not make use of his father's possession, and thereby crave the benefit of a possessory judgment, it not being of the nature of liferent right and fee, granted to a father and a son.

Fol. Dic. v. 2. p. 47. Gosford, MS. No 945. p. 622.

*• Stair reports this case.

THE Bishop of Dunkeld being patron of a prebendary, gave presentation thereof to Sir William Stewart of Innernytie, and thereafter to John his son. Sir William possessed it during his life, and his son some years after, who paid the Minister's modification out of the Prebend's benefice to Mr William Nairn, Minister, who discharged him as Prebend. Thereafter the Minister takes a presentation to the prebendary; and in a competition betwixt them, the Minister *alleged*, That Innernytie's presentation, in so far as it contains a substitution to John after his father's death, was null, disposing of a benefice not vacant, and an unwarrantable dilapidation of the Bishop's benefice; for if he might substitute one person to the present incumbent, he might substitute an hundred, and so exclude all his successors. It was *answered*, That a conjunction of two was ordinary and warrantable to endure to the longest liver; and this was the same in effect, and that the Minister had homologated and acknowledged Innernytie's right. It was *replied*, That the Minister's discharge was of his local stipend, and before he was Prebend himself.

THE LORDS found the substitution null, and preferred the second presentation.

Stair, v. 2. p. 498.

* * * This case is also reported by Dirleton.

A PRESENTATION being granted by a Bishop to a prebendary, in favour of a person during his lifetime, and, after his decease, to his son ; the LORDS found, in a multiplepointing, and competition betwixt the persons substituted in the said presentation, and another Prebend provided by the succeeding Bishop, by the decease of the first Prebend, That the substitution, contained in the presentation foresaid, did expire by the decease of the father, and that the substitution was void, in respect the Bishop could not, in prejudice of his successor, grant a presentation in the terms foresaid, bearing a tailzie and substitution.

Reporter, *Castlehill*.

Clerk, *Mr John Hay*.

Dirleton, No. 440. p. 215.

No 5.

1680. November 18.

The TOWN of HADDINGTON *against* The EARL of HADDINGTON.

IN a competition betwixt the Town and Heritors of Haddington and the Earl of Haddington, for the patronage of the second minister of Haddington, it was *alleged* for the Town and Heritors, That the stipend of the said minister was but a voluntary contribution, whereby the Town gives L. 400, and the Heritors 4 chalders of victual, not out of the teind, but by a cast according to their valued rent of stock and teind ; and therefore the right and patronage consisting mainly in the power of presenting ministers, and the enjoyment of the stipend during vacancy, there is no ground for the Earl, as patron of the kirk of Haddington, to pretend to either of these, but only to the presentation of the first minister, and his benefice during the vacancy, but no way to have any interest in this voluntary contribution ; for patronage being introduced to encourage mortifications of pious donations to the church, and therefore the builder of the edifice, the mortifier of the benefice, or of the ground, are thereby acknowledged patrons, whose interest it was to defend that church, and therefore did present a qualified person for the cure ; and if the patron become indigent, he was to be alimanted out of the fruits, and by our custom they had the same during the vacancy ; so that the Earl being acknowledged patron of the church, he hath all its privileges as he had them before the erection of the second minister, by whom he hath no detriment, and should claim no advantage ; and this is cleared by the common custom of the nation ; for, the most part of the towns of Scotland had only at first one minister, to whom they were not patrons ; but now, most of the considerable burghs have dotted stipends to their ministers by their voluntary contributions, whereof the patron of the first minister did never claim any interest ; and if the contrary should be found, it would discourage and hinder all such erections in time coming, and

No 6.

The town of Haddington having established a second minister, and provided him in a stipend by voluntary contribution, the patron was found to have right to present both ministers.

No 6.

draw these already made in question ; for none would contribute a stipend, if they had not power to call the minister, but that the patron might force one upon them, which might breed disquiet and dissatisfaction among them. It was *answered* for the Earl, That he being undoubted patron of the kirk of Haddington, he behoved to have inspection and protection of that kirk, and to provide qualified ministers therefor ; so that any dotation to this kirk was *accessorie*, and he behoved to be patron thereof ; for it cannot be pretended that the Town or Heritors could have introduced a minister in the kirk where he is patron, without his consent, nor can it be presumed that he would have consented to a second minister to preach in that kirk, but with submission to him as patron ; but if the Town of Haddington growing populous, one minister could not serve the whole congregation, their competent way was to have divided the parish, and erected a new kirk, in which case if the teinds had been affected, he would still have been patron, much more when there is no distinct parish, but a second minister helping the first in the same kirk ; nor can it be questioned, that a patronage once founded, if it were but by the building of the kirk, any mortification to the benefice could found a new patronage, or give the mortifier any interest with the patron. It was *replied* for the Town, That the patron's consent was clearly inferred by his patience in suffering a second minister to be erected and officiate in the kirk ; nor is there any reservation that he should be patron of that erection ; nor can it be instructed that ever he did present, but, on the contrary, there is produced an act of the Town Council of Haddington, bearing, the Earl of Haddington, then secretary, to have supplicated the Town, that Mr Trent his chaplain might be second minister, who was accordingly minister, and died but of late ; and the case here is not of an accessory mortification to the same kirk, but in effect the kirk becomes collegiate, the two ministers becoming colleagues, and may have two patrons, as is evident by the common law, that in collegiate kirks there might be more patrons dotting more benefices, and so likewise in new united kirks, though the one was suppress, and the minister were only to officiate with the other, that patron doth not become patron of the whole, but they did present *alternis vicibus*, albeit in dismembrations and annexations of parts of parishes to one entire parish, the patron of that parish was patron of the whole as accessory ; so that the patron admitting of the second minister, without reservation or protestation, the presumption is far stronger on the other part, that the contributors did not mean to put their minister in the power of another. It was *duplied* for the Earl, That the presumption was much stronger for him who had no opportunity of reservation, and protestations in that case are not kept after so long a time, but being so probable, are to be presumed ; whereas the contributors had a clear opportunity in their consent to the stipend of the second minister, to have reserved to themselves a right of patronage, in which case the patron allowing him to officiate, behoved to be understood according to the election ; neither will there be any inconveniency in preferring this patron for

the future, seeing the Lords' decision will clear that where contributors reserve the patronage, they will have right thereto, so that whenever they make such erections, it will ever be with that reservation, which if the patron refuse, the Commissioners for plantation of kirks will be Judges, and will not sustain the patron's wilful refusal when he can have no detriment. "THE LORDS, before answer, having allowed either party to adduce what evidences or adminicles they could, to clear how this second minister was erected, and when, and who did present at first and thereafter;" whereupon there was produced an act of presbytery in anno 1636, the Bishop being present, whereby the Town consented to L. 400, and the Heritors to 4 chalders of victual for a second minister; but there is no mention of the patronage, or any reservation or protestation, and immediately thereafter Mr Trent was put on his trials, who died but lately; and there is nothing instructed by either party who did present; the Town did also produce their act of Council, but the Earl answered, That the petition in the Town's act could not prove against him, unless the petition were produced, mentioned in the act, they having an evident interest for pretending to the presentation, to make such acts in their own books:

THE LORDS found, that in this case there being neither election nor reservation, nor protestation concerning the patronage, that the presumption was strongest for the Earl as patron, and that his allowing of the second minister was as being patron of both, and therefore preferred the Earl.

Fol. Dic. v. 2. p. 47. Stair, v. 2. p. 799.

* * * Fountainhall reports this case :

1680. July 31.—IN the declarator pursued by the Town of Haddington and Heritors of the landward parish against the Earl of Haddington, anent the presentation of the second minister of Haddington, the Earl having presented one as second minister, the LORDS upon a bill given in by the Town (in regard they could not get the cause advised this Session,) stopped the planting of the church, and any further procedure thereon, till the 1st of November next, as being vitious, done *pendente lite*, during which *nihil est innovandum*.

1680. November 13.—THE patronage of the second minister of Haddington (31st July 1680) was this day decided, and determined in favour of the Earl of Haddington against the Town and Heritors, albeit they paid the stipend. For it seems the Lords thought *dottatio* alone not enough to give a patronage, and that because there was no erection presentation, nor foundation proven; nor any reservation of the patronage made in the acts of the Town Council giving the said stipend, though they alleged it to be voluntary; yet it is not easy to revoke what is once given to the church; likeas he had got a decret thereon before the commission for planting of churches. Yet *Mascardus de*

No 6.

probat. Verb. jus patronatus affirms, that reservation of patronage is not necessary. The Lords also went upon this ground to prefer the Earl that he was patron of the whole church, and of the parson and first minister, and it being *ecclesia patronata*, he was founded *in jure communi* also as to the presenting the second minister, who is only in the case of an *ecclesia succursalis* or *auxiliatrix* to help the *ecclesia matrix*, as the canon law expresseth it, and so follows as accession of the first patronage.—Yet patronage was bestowed on founders both in gratitude and remuneration, and to be an encouragement and invitation for others to mortify; and the *patronus egenus* was alimanted *per ecclesiam*: And we know Mr Robert Reid left a legacy for a salary to the Bibliothecar at Aberdeen College, and the LORDS found the presentation belonged to his heirs, and not to the E. of Marishall who was patron and founder of the university, though it was only an accessory to the College; and by the canon law altarages, chapels, and oratories were allowed to be erected within patronate churches; and yet the patronage belonged to their founders. See Abbas, Consul. 105; Viviani rationale jur. canon. ad c. 25. Extra, de jure patronatus; Dearen. de beneficiis lib. 1. c. 4. where they give instances of altarages founded in *ecclesiis patronatis* which did not accresce, but the founders were patrons; as also they prove that patronage in such foundations needs not be expressly reserved, nor protested for. It was thought my Lord Hatton broke the neck of this cause, having the parallel case against the Town of Dundee, (*See infra.*); only, Dundee can instruct that they have presented, and their stipend is altogether uncertain and alterable.

Fountainball, v. 1. p. 112. and 116.

1683. January 10.

The TOWN of DUNDEE against The EARL of LAUDERDALE.

No 7.

Contrary to the above, the town having had possession of the right, and formerly exercised it.

THE town of Dundee having pursued a declarator against the Earl of Lauderdale, of their right of patronage of their second minister, upon this ground, that the town had been constantly in use to pay the stipend, and to call and present the second minister, which they proved by writs produced; and it being *alleged* for the Earl, That he and his authors, constables of Dundee, being infest in the patronage of the kirk of Dundee, if the town did adjoin another minister for their convenience, and doted a stipend for his maintainance, that could not prejudice the Earl; but it being an accessory donation, he ought to have the patronage thereof; and it was so found expressly betwixt the Earl of Haddington and the Town of Haddington, (*supra.*) where, in the competition anent the patronage of the second minister, the Earl of Haddington, who was patron, was preferred to the town, albeit the stipend for the most part was paid by the town; it was *replied* for the Town of Dundee, That the doting of

the stipend was one of the ways of acquisition of the patronage by the common law, and that the practise betwixt the Earl of Haddington and Town of Haddington did not quadrate in this case; for the possession was dubious and controverted betwixt the Earl and the Town of Haddington; but here the town of Dundee had not only doted the stipend, but have been in constant possession, by presenting and calling of ministers from time to time, and that the Earl of Dundee, and his predecessors, who were my Lord Lauderdale's authors, did never question or controvert the same.—THE LORDS, in respect that the second minister's stipend was paid by the town, and that they had been in possession by calling and presenting the minister without any question made by the constables of Dundee, my Lord Lauderdale's authors, declared in favour of the town.

Fol. Dic. v. 2. p. 47. P. Falconer, No 62. p. 22.

* * * Sir P. Home reports this case :

THE town of Dundee having raised a declarator against the Earl of Lauderdale, for declaring they had right to the presentation of a second minister, and had always been in use to present when this place vaiked, as appears by several acts of the Town Council; and that Mr Robert Rate, whom they had now presented to be second minister, was lawfully presented, and ought to be admitted; all *alleged* for the defender, that he being undoubted patron of the church of Dundee, and the right of patronage being indivisible, he had right thereby to present the second minister as well as the first; and, if there had been a distinct church erected within that benefice, the defender as patron, *ipso facto*, would have had right to present the same; much more where there is not a distinct church erected, but a second minister only, to be an assister and helper to the first, and so is only accessory, and *accessorum sequitur naturam principalis*, and does not alter the case in law, from whom the provision of the stipend does flow; for a patron of a church does oft times pay no proportion of the stipend; and if once benefices be founded, and a patronage acquired, a posterior donation to that same benefice, though far more considerable than the first erection, yet the posterior donatar will have no right to the presentation; and the right of patronage being introduced by law, not only as a remuneration and acknowledgment of the benefactors and founders of the benefice; but likewise upon the account that he should be overseer and guardian to the church; and it is the person who shall have the choice and nomination of the incumbents, who shall serve the cure, and without whose advice the titulars or present incumbents cannot dispose of the benefice; and this case was expressly decided upon a full debate betwixt the Earl of Haddington and the town of Haddington, (*supra*). in the same terms where the town and landed heritors had provided a second minister, without any assistance from the Earl of Haddington, patron of the church; and therefore craved that they may be allowed to pre-

No 7.

sent the second minister, that is presented to themselves; the Lords found; That the presentation belonged to the Earl of Haddington, who was patron of the church, albeit he contribute nothing to the stipend; and as to the town's possession, it was only the time of the late troubles, when there were great invasions made upon the rights of the church and patrons; and the acts of the Town Council cannot make faith in behalf of themselves, or against a third party; and albeit the town has been in immemorial possession of presenting the second minister, yet possession cannot prescribe a right without the title.—*Replied*, That albeit the defender be patron of the church, and that *jus patronatus sit indivisibile*; yet that can only be understood as to that benefice, but cannot be extended to any voluntary contribution, settled by the town for a second minister, whereunto they were not obliged in law, but was done only out of their own good will, of the good of the inhabitants: And it is clear by that title of the common law, *de jure patronatus*, that whoever dotes or founds a benefice should have the right of patronage thereof; and which is clear from the many chaplainries that have been founded in Scotland, which, albeit they are founded within another benefice, yet the patron of the benefice did never pretend right thereto, but the sole right of presentation did belong to the founders and dotters of the chaplainrie: And albeit if any person should make a donation in favour of a benefice, the right of presentation will still belong to the patron, because in that case the donation becomes accessory to the benefice; but if any person make a distinct foundation, separate from the benefice, the right of presentation will belong to the founder, and will not accresce to the patron of the other benefice: And this is clear in the general, far much more in this particular case, they having been in immemorial possession of presenting the second minister, which appears not only from the acts of the Town Council, which being extracts of the public register of the town, ought to make faith even against third parties; but also by contracts betwixt the town and the second minister, many years before the late troubles; and it is clear by that title in the common law, *de jure patronatus*, and the lawyers thereupon, that a right of patronage may be prescribed without a title; and the Earl of Lauderdale and his predecessors were never in use to present second ministers; and the practick betwixt the Earl of Haddington and the Town of Haddington does not meet this case, because in that case it was dubious whether the Earl of Haddington be patron, or the town and landward heritors had been in possession to present a second minister, and *in casu dubio*, the presumption being always for the patron, therefore the Lords preferred the Earl of Haddington to the right of presentation; whereas there is no doubtfulness in this case, seeing it is evident the town has always been in the use to present second ministers: But it is not only the case of the town of Dundee, but of many burghs of Scotland, who, out of their own liberality and good will, have given large provisions to second ministers, and upon that ground are always in use to present them; which right of presentation, if it were taken from them, would dis-

courage all such pious donations.—THE LORDS declared in favour of the Town of Dundee, in respect the second minister's stipend was paid by the town, and that they had been in possession of calling and presenting the second minister, without any question made by the Constables of Dundee, the Earl of Lauderdale's authors.

Sir P. Home, MS. v. 1. No 368.

. This case is reported by Harcarse :

THE Town of Dundee having made a foundation of a stipend for a second minister there, the Earl of Lauderdale, Constable of Dundee, claimed the presentation as patron of the church ; because, though *in ecclesia non patronata dos, fundus, or constructio edificii*, founds a right of patronage ; yet *in ecclesia patronata*, the old patron is to be patron of the new erection, unless there be a right of patronage reserved in the mortification ; especially seeing there is but one church for both the first and second minister.

Alleged for the Town ; That they, as founders of the second minister's maintenance, are founded in law in the right of presentation, unless they had dispensed with it. And by the canon law there might be within a *matrix ecclesia* other *succursales*, or *auxiliatrices ecclesia* having distinct patrons from the mother church ; and if it were otherwise, the mortifying of stipends to second ministers would be discouraged : Besides, it appears from several presentations 60 years ago, that the town of Dundee were in use to present the second minister ; and it did not appear, that any was ever appointed by the Constable.

THE LORDS declared the sole right of calling the second minister to belong to the Magistrates of the town of Dundee.

Harcarse, (PATRONAGE.) No 750. p. 212.

. This case is also reported by Fountainhall :

1683. *January 11.*—THE debate betwixt the Town of Dundee and my Lord Halton, now Lauderdale, anent the patronage and presentation of the second minister there, being reported, ' THE LORDS preferred the Town's right upon ' their dotation, former presentations and possession ; '—notwithstanding he was patron of the parson ; and the contrary seemed to be decided on the 18th of November 1680, for the Earl of Haddington against the Town of Haddington, *supra* : But they differenced the cases ; for the Town of Haddington's possession was not so pregnant and clear.

Fountainhall, v. 1. p. 206.

1709. February 5.

The MAGISTRATES of LANARK *against* The EARL of MURRAY.

No 3.

The brocard
patronus mei
patroni est
mibi patronus,
does not ap-
ply where
another pa-
tron is
known.

IN the competition for the vacant stipends of the parish of Longbride, betwixt the Town of Lanark, as having a gift thereof from the Treasury, and the Earl of Murray, who, in consequence of his being patron of the church of Alves, whereof the parson was patron of Longbride, pretended to the right of patronage of Longbride, according to that rule of the canon law, *patronus patroni mei, est patronus meus*; the same way as by our custom, *vassalus vassali mei, est vassalus meus*; because, as Craig observes, when the immediate vassal fails, the mediate vassal ascends up in his place, and holds by the same tenor of the paramount superior:—THE LORDS, without regard to the brocard, found that the Earl cannot pretend to the right of application of the vacant stipends of Longbride, unless he instruct that he hath particular right of patronage of that church; albeit it was alleged for the Earl, that probably the curacy of Longbride, (which is a pendicle of the parsonage of Alves) was doted out of the rents of the greater benefice; and thereby the Earl, as patron of the latter, was entitled to the patronage of the former, by the rule *patronem faciunt dos*, &c. and the patron of the first minister of Haddington, No 6. p. 9901. was found to be patron of the second, though provided by the town.

Epl. Dic. v. 2. p. 48. Forbes, p. 318.

* * * Fountainhall reports this case :

1709. February 8.—THE Magistrates of Lanark having got a gift from King William, of 2000 merks, out of the first and readiest of the vacant stipends of the kirk of Longbride, for mending and repairing their bridge, they pursue Innes of Cockston, and the other heritors of that parish for payment. They founded on partial payments by repairing the kirk and manse, and the 20 merks paid to the ministers sent there by the presbytery to preach; but after deduction and allowance of these, there was still as much in their hands as would pay the sum given to the town of Lanark; and a decret being craved against them, compearance is made for the Earl of Murray, for whom it was *alleged*, That he, as patron of Longbride, had by act of Parliament the administration and disposal of its vacant stipends to pious uses, and so the gift from the King and his Exchequer was null; and he was ready to make application of it to uses nearer home than Lanark bridge; and the way he qualified his being patron was, that Longbride was but a pendicle of the kirk of Alves, and he being patron of Alves, the *ecclesia matrix*, he, by consequence, was also patron of the kirk of Longbride, which was only disjoined and dismembered from it for the conveniency of the people, as a chapel of Ease.—*Answered*, *Esto* he were patron of Alves, the mother church, and that Longbride were but one of its daughters, yet it never makes him patron of Longbride, because, by presentations produced, it appears the parson of Alves was patron of Longbride, who put him in as vicar, even as bishops did in their mensal kirks; so that this patronage by the abolition of pre-

lacy devolved to the Crown, and did not accresce to the Earl of Murray; and the brocard *patronus mei patroni est mihi patronus*, does not hold where another patron is known.—THE LORDS found the Earl was not patron, and so had no right to the vacant stipend of Longbride. Sir George M'Kenzie, in his Latin pleadings, p. 131. shows, that the Earl of Haddington, as patron of the first minister of that town, had likewise the right of presenting the second minister, though founded and paid by the town, as being only an accessory consequence depending upon the first. See it from Stair's decisions, 18th Nov. 1680. No 6. p. 9901.

No 8.

Fountainhall, v. 2. p. 489.

1735. February 15. MONCRIFF against MAXTON.

No 9.

IF a PRESBYTERY refuse a presentation duly tendered to them, in favour of a qualified minister, against which presentation or presentee there is no legal objection, and admit another person to be minister, the patron has right to retain the stipend, as in the case of a vacancy. See APPENDIX.

Fol. Dic. v. 2. p. 47.

1748. November 19. COCHRAN, Petitioner.

No 10.

THE presbytery of Dunfermline having refused to receive the patron's presentee, and proceeded to appoint a day for the ordination of another; Charles Cochran of Culross, the patron, presented a bill of advocacy of the settlement, which the LORDS unanimously "refused as incompetent."

Fol. Dic. v. 4. p. 49. Kilkerran, (PATRON.) No 2. p. 374.

1749. January 21. COCHRAN against The OFFICERS of STATE, and Others.

No 11.

IT is an established point, that an erection or settlement of a second minister accresces to the patronage of the first charge; and accordingly, it was here found, that Charles Cochran of Culross, the pursuer, being patron of the parish of Culross, was entitled to present to the office of second minister, which had been erected upon the contribution of the heritors.

But an objection having been made to Mr Cochran's charter of the patronage, that it had not been granted with consent of the incumbent for the time, without which grants of patronage from the Crown are declared void by act 172d, (176) Parl. 1593, the act was found to be in disuetude, or rather that it was but a temporary act, to continue during the life of the King then reigning.

Fol. Dic. v. 4. p. 50. and 54. Kilkerran, (PATRON.) No 3. p. 374.

55 D 2

No 12.

Circumstances from which it was ascertained that the patronage of a particular parish belonged to the Crown.

1749. *January 31.* HAY of Lawfield *against* The OFFICERS of STATE.

JOHN HAY of Lawfield insisted in a declarator against the Officers of State for the interest of the Crown, of his being patron of the Parish of Cockburns-path, *pleading*, That he had right by progress to a charter in 1666 of *novodamus* upon a resignation of the barony of Old-Hamstocks, Una cum advocacione donatione et jure patronatus ecclesiæ de Old-Hamstocks, cappellani de Cockburns-path, et hospitalis ejusdem : That the present parish of Cockburns-path, excepting the barony of Old-Cambus, had been part of the old parsonage of Old-hamstocks, within which lay the chapel of Cockburns-path, the parson of Old Hamstocks being patron thereof: That it appeared from the register of the General Assembly 1581, Cockburns-path was then a parish-kirk, having its own minister; notwithstanding whereof, the parson of Old-Hamstocks retained his title over the whole benefice till the year 1708, when Lord Alexander Hay, the patron, brought an action on the act 25th, Parl. 1693, for restricting him to a stipend, in which he called the parson, and also the minister of Cockburns-path, and heritors of both parishes; and in respect the minister of Cockburns-path's stipend was formerly payable by the parson, allocated to him a stipend upon the teinds of Cockburns-path; and also allocated to the parson L. 310 out of the teinds, parsonage, and viccarage of Cockburns-path, other than those of the lands of Old Cambus. Lord Alexander also obtained a decret 1709, finding him, in virtue of act 23d, Parl. 1690, entitled, as patron, to the feu-duties of the kirk-lands of Cockburns-path; and the heritors of the parish had bought from him their teinds, in so far as not allocated.

Pleaded for the defenders, There are several points agreed betwixt the parties, to wit, that by the records of Assembly 1581, there were three distinct parishes, Old-Hamstocks, Old-Cambus and Cockburns-path; that these two last make now one parish, though the time of union cannot be determined: That there was within the parish of Cockburns-path a chapel, endowed with part of the teinds thereof, of which the parson of Old-hamstocks was patron, and that the pursuer is patron of Old-Hamstocks; but it is not granted that at any time Cockburns-path made part of the parish of Old-Hamstocks: The heritors of Cockburns-path derive from the pursuer right only to a small part of their parsonage, and one somewhat larger of the viccarage teinds, to wit, what formerly belonged to the chaplainry, and these alone he pretended to allocate; but their right to three-fourths of their teinds is derived from the nunnery of St Bathans; so that there is no presumption from the teinds belonging to the parson, that these lands made part of his parsonage; for in fact, they never did belong to him but a small part to the chaplainry; and the Crown, in the years 1662, 1663, 1671, and 1682, presented to the parish of Cockburns-path.

Replied, The allocating the viccarage teinds to the minister, does not prove that Cockburns-path made no part of the parsonage; For the parson has right

to viccarage teinds, where there is not a perpetual vicar, who makes a separate titularity; and before this decreet, part of the minister's stipend was paid out of Old-Hamstocks; which can only be accounted for, by the parish having made part of that parsonage

No 12.

On the report of this pleading, it was remitted to the LORD ORDINARY to hear parties' procurators on the right to the teinds, and from what parties they did flow.

Pleaded for the defenders, The right of three-fourths of the teinds of the parish belonged to the nunnery of St Bathans, and were set in tack to the Earl of Home in the year 1613, for his life and the lives of three heirs, and thrice nineteen years, by the prioress, then become a protestant and married, with consent of her husband the Commendator of Bewlie; and a decreet of transumpt, 1632, of the said tack was obtained at the instance of Nicolson of Cockburns-path, assignee thereto.

The prioress also disposed these teinds, 1622, to David Lindsay, son to the Bishop of Ross, who was infest therein 1673.

For the pursuer, There was never any possession upon this tack, and consequently it is but a slender evidence of the right of the teinds; on the contrary, the teinds of Cobkburns-path are partly allocated, as is said, by the pursuer, and partly possessed by the heritors, either without title, or by purchase from him. It appears that the minister was paid by the parson of Old Hamstocks, from a decreet of augmentation at his instance, ratified in Parliament 1633, and by the modification 1708, when his whole stipend, as well as part of the stipend of Old-Hamstocks was localled on the teinds of Cockburns-path; and the whole lands in the parish, other than these of Old-Cambus, are burdened with this locality.

THE LORDS found, That the patronage of Cockburns-path belonged to the Crown.

Reporter, Strichen.

Act. R. Craigie.

Alt. W. Grant. & Haldane.

Clerk, Justice-

D. Falconer, v. 2. No 49. p. 47.

1749. February 25. HAY of Belton against The PRESBYTERY of Dunse.

JOHN HAY of Belton having right to the patronage of the parish of Dunse, by disposition from Hay of Drummelzier to the late Lord Blantyre, the present Lord's retour and disposition, presented 27th August 1748, Mr Adam Dickson probationer, who accepted 3d September of the same year.

The Presbytery of Dunse hesitated on Mr Hay's right, alleging him to be only trustee for Drummelzier, who was not qualified by taking the oaths to the Government, and so not entitled to present; whereupon Mr Hay deponed before them, to this import, that he was no trustee, but had the title for life, and had executed a deed obliging his heir to denude.

No 13.

A declarator at a patron's instance that he had presented in due time was sustained as competent.

No 13.

The Presbytery, 6th December, appointed a moderation of a call on 23d January 1749, for supplying the vacancy.

Mr Hay appealed to the synod, pending which he insisted in a declarator before the Court of Session, that he had presented in due time, and that the right of settling a minister had not devolved to the Presbytery: And the LORD ORDINARY, upon advice, 15th February 1749, "repelled the objections to the pursuer's right, and to the person by him presented, on account of his not having taken the oaths before his first licence; and found that the pursuer had in *possessorio* sufficient right to present, and that the right had not fallen to the Presbytery *tantum jure devoluto*."

Pleaded in a reclaiming bill, Matters proper for the cognition of a presbytery, or other ecclesiastical judicature, and by them determined, cannot be brought under review before a civil court: The trial and admission of ministers belongs to the church, as is declared by act 7th, Parl. 1567, by which patrons are appointed to represent to the superintendant, with an appeal competent to the superintendant and ministers of the province, and from them to the General Assembly, where the case is to take end. This right was always enjoyed by the church of Scotland, excepting that in times of episcopacy, letters of horning were granted against the bishop to collate, but there was never any such practice competent under presbytery. The Presbytery had, notwithstanding the presentation, appointed a moderation, the affirmance or reversal of which sentence was pending by the pursuer's own appeal before the synod; so that they are *functi* till a determination, and cannot admit the presentee, if the LORDS should declare the patron's right; as neither can they proceed to a settlement, if they should assoilzie from the declarator, when perhaps the synod will reverse their sentence.

The petitioners have judged that Mr Dickson has not been duly presented, and apprehend, for the reasons given, their judgment not liable to be reviewed by any civil court; but if it were, they say that the pursuer's right is derived from Lord Blantyre, who derives from Drummelzier; that Blantyre presented the last minister, but subsequent to his title, Drummelzier obtained a decret for the vacant stipends; so that the Presbytery could not but consider him as patron, and, he being unqualified to present, the conveyances are a contrivance to present by the interposition of another person.

The presentee was not qualified by taking the oaths before his licence; but to this it was *answered*, that he had qualified, and got his licence renewed.

The Presbytery acknowledged the competency of a declarator of a right of patronage before a civil court; but apprehend they are not the proper contraditors, as pretending no right to the patronage of any parish.

Observed, That a right of patronage was a civil right, and might be declared; as also it might be declared, that the patron had presented in due time; in which action the Presbytery were the proper persons to be called, as having

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right after lapse of six months to present, or to settle *pleno jure*; and the Court would not take notice of what method they chose or making the settlement, whether by moderation of a call or otherwise, since that was not prescribed by the law: That the declarator nowise affected their power of trying or admitting a minister; and though taken ill by the Presbytery, was rather a favour to them, in that, by being brought before a final settlement, it gave them an opportunity of being satisfied, whether there was here a regular presentation, that they might not by mistake make a settlement in opposition thereto; the consequence of which would be, that the minister settled would have no legal title to the benefice, as was found in the case of the Minister of Auchtermuchty, though in that case, happily for the minister, there proved to be a defect in the patron's title: That the patron had deponed he was no trustee, and if he were, it did not hinder him to present.

N. B. There was another disposition produced from Drummelzier to Belton; to which it was *objected*, that he had not deponed, whether that disposition were in trust.

It was *said* on the Bench, it might be an objection, if a patron held in trust for an unqualified person; and some LORDS doubted of the competency of the action, if the Presbytery had not improperly sisted themselves.

THE LORDS adhered to the Lord Ordinary's interlocutor, (and found that the general words, *decern and declare*, can go no farther than the particulars determined).

Petitioner, R. Craigie.

D. Falconer, v. 2. No 65. p. 68.

1751. July 10.

LOCKHARTS of Lee and Carnwath *against* The OFFICERS of STATE.

JOHN LOCKHART of Lee, and George Lockhart of Carnwath, insisted each in a declarator against the Officers of State, of their severally having right to the patronage of the parish of Lanark.

Pleaded for Carnwath, King James VI., 27th March 1604; erected the priory of Inchmaholm, and the abbeys of Cambuskenneth and Dryburgh, into a Lordship, to be called Cardross, in favour of the Earl of Mar; together with the right of patronage of the kirks belonging to these prelacies; particularly disposing these kirks, and amongst them that of Lanark. The disponsee was infeft 1605, and the grant confirmed in Parliament 19th July 1606.

The Earl of Marr 1612 disposed this estate to Henry Lord Cardross, his second son; and David Lord Cardross obtained a charter of *novodamus* 1664 on his own resignation, comprehending *terras ecclesiasticas de Lanark*; together with several kirks mentioned, amongst which Lanark is not named; together with the right of patronage of the kirks and parishes above-mentioned; and he was infeft 1668.

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The Exchequer being settled by act of Parliament 1645, with power to expedite new gifts; and having gifted a patronage without warrant from the King; and the rights of private persons being saved by the act rescissory of the acts of this Parliament; the gift was not found good.

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This right came into the person of Lockhart of Carnwath, who, 13th August 1708, gifted the vacant stipend to the widow and children of Mr John Bannatyne, the late incumbent.

Pleaded for the Officers of State, The Earl of Mar did not depend on the charter granted him; the reason whereof has been, that by the act 176th, Parl. 13th, James VI., the grant of patronages of benefices, whereof the incumbent was alive, was void; and that several of the incumbents of the benefices, whereof the patronages were granted, had been alive. He therefore obtained a new charter, 10th April 1615, of the lands and baronies belonging to the abbey of Dryburgh, comprehending the kirk-lands of Lanerk, ordaining that sufficient ministers should be provided to the said kirk, who should be named and presented by the King; accordingly, the King presented in 1616 and 1643, since which time there has been no opportunity of presenting till the death of the last incumbent, whereby the present dispute has been occasioned.

The pursuer has produced no conveyance from the Earl of Mar to his son the Earl of Cardross.

Observed, The grant of the patronage to the Earl of Mar has been void, as not being then in the Crown; for it appears by the subsequent charter 1615, that there was then a commendator of the abbey, whose resignation had been after that time obtained.

Pleaded for Lee, King Charles I. 8th August 1674, granted the patronages of Lanark and Carlouck to his ancestor; his family has since had no opportunity of presenting to Lanark; the incumbent, at the time of his grant, having held the benefice till he left it at the Revolution, when Mr John Bannatyne, who had a meeting-house in Lanark, took possession of the church without any title, and held it till his death in 1707, and then Mr Orr was called by the heritors and elders; but Lee gifted the vacant stipends to Mr Bannatyne's widow and children, who, on that title, named a factor, and he uplifted the same; nor is it any objection to this act of possession, that Carnwath thought proper, after his gift, to give another to the same parties: Lee also presented to Carlouck in 1731 on the same title, and the presentee was settled.

Pleaded for the Officers of State, The charter is a grant of *novodamus*, on a resignation of the family estate; it is dated at Edinburgh, where the King was not at the time; so that it appears there was no warrant for the additional grant of patronage; nor indeed could there be, as the King was then prisoner to the English rebel army.

Answered, Lee has a gift under the seals, and ought not to be put to show the warrant thereof after so long time. *2dly*, The Exchequer was then settled by act of Parliament 1st February 1645, with power to expedite new gifts; and though this Parliament is rescinded by act 15th, Parl. 1661, the rights granted to particular persons are saved.

Observed, The Parliament gave power to the Exchequer to grant the King's casualties, but not to dispose of the patrimony of the Crown.

THE LORDS found neither of the pursuers had produced sufficient titles to the patronage in question; and that for ought yet seen, the right remained in the Crown.

Reporter, *Justice-Clerk.*

Alt. *Advocatus.*

Act. for Carnwath, *A. Pringle*; for Lee, *R. Craigie*;

Clerk, *Kirkpatrick.*

D. Falconer, v. 2. No 219. p. 263.

1752. June 27.

WILLIAM URQUHART of Meldrum *against* The OFFICERS of STATE and HERITORS of Cromarty.

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A grant by the King of the patronage of a common kirk in 1588, ratified in Parliament 1592, erecting the same into a parsonage, found to be good without consent of the chapter and bishop, and to subsist notwithstanding the acts 1606 and 1617, restoring bishops and their chapters.

A patronage once united, and passing, by infestment, along with lands, cannot be afterwards conveyed without infestment; but a sasine bearing in general "juris solemnitatibus contractis debite observatis," was held sufficient.

This last point was affirmed upon appeal.

THE kirk of Cromarty was one of the common kirks belonging to the bishop and chapter of Ross; and in 1588, King James VI. granted to Sir William Keith a charter of the barony of Delny, and certain other lands, containing an erection of the kirk of Cromarty, and other eighteen kirks, which had belonged to the said bishop and chapter, into parsonages, and granting to Sir William the teinds and patronage of these kirks, and uniting the whole into one barony; upon which Sir William was infeft. And in June 1592 this grant was ratified in Parliament.

This right came by progress into the person of Sir Robert Innes; who, in 1636, entered into a contract with the bishop of Ross, narrating a process of reduction and improbation which the bishop had against him for setting aside his right to these patronages; and that, willing to prevent further questions, he resigns all these patronages in the King's hands in favours of the bishop, declaring, that the bishop should be at liberty to use that right, or his ancient right, as he thought most proper,

On this contract a charter was expedited in favour of the bishop in the same year 1636, and the bishop was infeft 19th September 1637. But the sasine, as appeared from the register (for the principal was lost,) contained no symbol of infestment, and wanted the sign and subscription manual of the notary.

In July 1656, the said Sir Robert Innes disposed the said lands and patronages in favour of Sir George Mackenzie of Tarbat, afterwards Earl of Cromarty; on which Sir George expedited a charter, and was infeft.

The Earl of Cromarty disposed the estate and patronage of Cromarty in favour of his son Sir Kenneth Mackenzie; and the said estate and patronage being brought to a judicial sale by Sir Kenneth's Creditors, William Urquhart of Meldrum became purchaser.

William Urquhart brought a declarator of his right of patronage, and called as defenders the Officers of State, the Heritors of the parish, and the Presbytery as is usual.

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Pleaded for the defenders, 1^{mo}, That the grant of the patronage of the kirk of Cromarty and the other kirks, by the King to Sir William Keith in 1588, was void and null; for that as they belonged to the bishop and chapter of Ross, the King had no power to dispose of them without consent of the bishop and chapter; who, notwithstanding of the Reformation, were still existing at the date of the grant; for although the ministration, in offices of religion, was carried on by those called the travelling clergy, yet they were not the clergy authorised by law till the year 1592, when presbytery was established; and it appears from the records of the Privy Seal, that, from the Reformation to 1592, bishops continued to be elected by the chapters as formerly; three instances of which occur in 1572, viz. St Andrews, Dunkeld, and Sodor. And chapters continued in the full right of their benefices till 1594, when their common kirks were taken from them. The King, therefore, having no power to make the grant, the ratification in Parliament could not make it valid, because of the act *salvo jure*.

2^{dly}, By 2d act, Parl. 1606, and 2d act, Parl. 1617, restoring bishops and their chapters to their patrimony, the whole kirks, which had belonged to the bishop or chapter of Ross, were restored to them; and though there be an exception in each of these acts, yet the case of the patronage in question does not fall under either of these exceptions; for the exception in the act 1606, of common kirks disposed by his Majesty to whatsoever persons preceding the act, does not refer to the case of a common kirk erected into a parsonage, where the patronage is disposed to a laick; for that is not a disposition of a kirk which can only be to a kirk-man; but the exception respects only cases where the King had disposed the kirk to another bishop, or settled a minister in it, who by the exception was to enjoy the benefice during his life.

Neither does the exception in act 1617, "That it shall be without prejudice to laick patrons of their patronages granted to them by the King's Majesty, with consent of the titulars for the time," aid the pursuer; in the *first* place, because it respects only the case where patronages of Kirks had been granted away, which formerly belonged to the bishops and chapters, and were held and used by them in the same way as laicks used their patronages; but could never respect the mensal or common kirks, without which the bishops and their chapters could not be supported. In the *second* place, The grant in favour of Sir William Keith was without consent of the titular, whether the bishop and chapter be considered as the titulars or the incumbent for the time, in terms of the act 172d, Parl. 1593*.

3^{dly}, Supposing the grant valid, yet the Crown, as come in place of the bishop of Ross, ought to be preferred to the pursuer; for Sir Robert Innes in 1636 disposed the patronage to the bishop, which was long prior to his disposition in favour of Sir George Mackenzie, and therefore the bishop's right was preferable to Sir George's, though no infeftment had followed on it; for a right of patronage, being *jus incorporale*, passes without infeftment, Stair Inst. b. 2. tit. 8.

* Glendook's Edition.

§ 35. And though the patronage being united to a barony will make a conveyance of the barony transmit the patronage, though not particularly mentioned, yet it does not transform the nature of the right so as to make it a corporeal one. But supposing it should have the effect to communicate to this incorporeal right, the qualities of a corporeal one, yet as soon as the union was dissolved, these qualities flew off. Now the King, who created the union, had power to dissolve it; and did so by his charter upon Sir Robert Innes's resignation in favour of the bishop in 1636. Besides, it appears from the register of sasines for the shire of Inverness, that the bishop was infeft in this right upon the 19th of September 1637.

Answered for the pursuer to the first defence, That before the date of the grant in favour of Sir William Keith, chapters were abolished, and had no right either to officiate in kirks themselves, or to present others thereto; for, from the beginning of the Reformation, the Protestant clergy, who were governed by their own superintendants, were the clergy established by law, as is declared by acts 6th and 7th, Parl. 1567; by the last of which the right of laick patrons was reserved to them; but the patronages which belonged to ecclesiastics, now become by law incapable to exercise them, did of course devolve upon the Crown; and so it has been understood by the legislature in all the statutes relative to these matters. By act 100th, Parl. 1531, it is statuted, "That every parish-kirk shall have its own pastor;" and by act 102d of the same Parliament, it is enacted, "That all benefices of cure under prelaties shall be presented by our Sovereign Lord and the laick patrons, in favour of able and qualified ministers." In this statute the King is held to be patron of all kirks which were not of laick patronage; and so it has been always understood by our lawyers, *Craig, lib. 2. dieg. 8. § 37.*

And particularly with respect to common kirks, it was ordained by act 196th, Parl. 1594, "That they should be of the same nature with other parsonages and vicarages, and should be conferred by presentation of the lawful patrons." Sir George Mackenzie, in his observations on this act, says, "That the King, or such as had right from him, became patron of these kirks, as coming in place of the Popish clergy." And he also adds, "That there were not then chapters." With him agrees Lord Stair, *Inst. b. 2. tit. 8. § 35. p. 309.* So there can be no doubt of the King's power to make the grant in favour of Sir William Keith. It is of no importance that there were some few elections of bishops by chapters soon after the Reformation; for these were not elected with a view to have any share in the government of the church, but rather to give their assistance in disposing away the temporalities thereof to others.

Answered to the second defence, That the act 1600 does plainly confirm all grants of this nature; "for it excepts and reserves all common kirks which are disposed by his Majesty to whatsoever person preceding this present act." And this clause cannot be limited to the case of kirks disposed to kirkmen, as

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appears from the following clause of the act; whereby it is provided, "That if there be any common kirks pertaining to bishopricks and their chapters of old, that now pertain and fall to them by virtue of this act, the ministers who are lawfully provided to the said common kirks shall noways be prejudged during their lifetimes." Here a plain distinction is made betwixt common kirks disposed away to laicks and those conferred by presentations to ministers; the first are excepted from the act, the others are to return to the bishops and their chapters, saving the right of the incumbents during their lives.

Neither can the act 1617 be pleaded to defeat the effect of the grant in favour of Sir William Keith; for grants of that kind are expressly excepted from the act, and that without distinguishing whether the kirks were proper patronages vested in the chapter before the Reformation, or were common kirks. By the act, these grants are saved, though not ratified in Parliament; and therefore there can be no doubt of such as are secured by so ample a ratification as the one in question is.

The consent of the titular to the grant was not necessary, as that was only required to save grants not ratified in Parliament; and though it had been necessary, yet by titulars could not be meant the Popish chapters who were not then in being; and whose advice, if they had been in being, would never have been asked. But the clause of act 1617 must refer to act 172d, Parl. 1593, which requires the consent of the beneficed person; and if so, it is incumbent on the defenders, before their objection can be sustained, to prove that there was a beneficed person alive at the date of the grant; and though they proved this, yet, *posi tantum temporis*, it must be presumed that the consent was given, as the LORDS lately found in the case of the patronage of Culross, No 11. p. 9909. And though not presumed, yet as the objection operates only in favour of the Crown, it is excluded by the ratification, and is also cut off by the negative prescription.

To the third defence, *answered*, That there are proper symbols established for infefting singular successors in rights of patronage, as well as in other real rights; but whatever might have been the case with respect to a right of patronage upon which no infeftment had ever passed, to which the citation from Lord Stair refers, yet when the patronage was once united to a barony, and infeftment taken upon it, it could not be transmitted without infeftment; and therefore Sir George Mackenzie's prior infeftment (supposing the bishop not to have been infeft) must carry this right. Had Sir Robert Innes disposed the whole barony, as well as the patronage, to the bishop, and afterwards disposed the whole to Sir George, it could not have been disputed that Sir George's right would have been preferable in respect of the first infeftment; and it must be a very extraordinary paradox if an acquisition should be more effectual when the acquirer gets only a part of the subjects contained in his author's infeftment, than if he had got the whole.

With respect to the infestment said to have been taken by the bishop, a reference to the records, in a competition of real rights, is not sufficient; the defenders must either produce the principal sasine, or prove the tenor of it.—*2dly*, The sasine, such as it appears from the records, is null, because it bears no symbol of infestment, and wants the sign and subscription manual of the notary.

Lastly, As the pursuer acquired the right at a judicial sale, he is secured by act 6th Parl. 1695; and whatever action, under the right of the bishop, may lie against the receivers of the price, there can lie none against the purchaser.

“THE LORDS repelled the first and second defences, and remitted it to the LORD ORDINARY to hear parties on the third defence, viz. whether the bishop of Ross’s right from Sir Robert Innes is preferable to the pursuer’s; and also to hear parties on the act of Parliament 1695.”

1753. *July 28.*—IN the case betwixt these parties, concerning the right of the patronage of the kirk of Cromarty; for which, see what is mentioned above, the Lord Ordinary reported the points remitted to him by the interlocutor of that date, viz. “Whether the Bishop of Ross’s right to the patronage from Sir Robert Innes, by the contract 1636, is preferable to the pursuer’s right derived from the said Sir Robert Innes, by disposition in 1656; and also, whether the pursuer’s right be secured by the 6th act Parl. 1695, he having purchased the patronage, together with Sir Kenneth Mackenzie’s estate, at a judicial sale.”

On the first point, the pursuer *objected*, That the contract 1636, whereby Sir Robert Innes disposed the patronage to the Bishop, was null by act 80th, Parl. 1579; because, though the names of three witnesses to the subscription of Sir Robert Innes be inserted, yet these witnesses are not designed, unless the defenders will condescend who were the witnesses, and astruct the condescendence.

Answered for the defenders; That there was no necessity for designing the witnesses until the statute 1681; for the act 1579 only requires, that witnesses be designed in deeds, not subscribed by the party, but by notaries; and it appears from the records, that, betwixt the 1579 and 1681, great numbers of deeds were executed without designing the witnesses.

Replied for the pursuer; That it is evident the clause of the act 1579, requiring witnesses to be “denominate by their special dwelling-places, or some other evident tokens,” refers as well to deeds subscribed by the party, as to those subscribed by notaries. Sir George Mackenzie considers it in this view, in his observations on that act; and so have the LORDS in many cases; particularly 15th July 1664, Colvill against Executors of Lord Colvil, *voce WRIT*; and, 3d February 1665, Falconer against Earl of Kinghorn, *IBIDEM*; where they found, that if the witnesses were not designed in the deed, the user of it behoved to condescend on them, and prove his condescendence;

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and what is enacted by the 5th act Parl. 1681, is, that the deed shall not be suppliable by condescending on the witnesses, if they be not designed in the deed itself.

"THE LORDS sustained the objection, That the witnesses designations were not insert in the body of the contract 1636; but found, that the same might be supplied by condescending on their designations, and astructing the same." See WRIT*.

The pursuer further *objected*, That supposing the defenders should be able to condescend on the witnesses, and astruct their condescendence, yet the pursuer's right is preferable, because derived from the Earl of Cromarty, to whom Sir Robert Innes, in 1656, disposed this patronage along with the barony of Delny, upon which the Earl expedite a charter and was infeft; and therefore, though he had the posterior disposition, yet he was preferable to the Bishop of Ross, by having first completed a title by infeftment; for the infeftment said to be taken by the Bishop in 1636, is null, for several reasons to be afterwards mentioned.

Answered for the defenders; That a patronage, by its proper and original nature, is neither a feudal subject nor held by a feudal tenure, but is a personal right or privilege like nobility, and is designed by the canonists to be *jus idoneos rectores in ecclesiis instituendos episcopo offerendi; quod alicui in ecclesia acquiritur, quod eo ipse, vel ejus auctores, ecclesiam posuerint, edificarint, vel opibus non minimum auxerint, consensu episcopi adhibito, ex quo jure, cum utilitate, honor et onus simul resultant.* Calvin. *voce Patronatus.* Agreeable to this, Lord Stair, b. 2. tit. 8. § 33. says, "That though patronages do ordinarily pass as annexed to lands by charters of boroughs, baronies, or lordships, yet they may pass without infeftment as *jura incorporalia.*" This patronage was held according to the original nature of the right, by the Bishop or chapter of Ross without any infeftment, till the year 1588, when it was annexed to the barony of Delny, and with that barony granted by King James VI. to Sir William Keith; and so soon as it was disunited from the barony, which it was by the contract 1636, it returned to be of its original nature, that is, an incorporeal right, held and transmissible without infeftment.

Replied for the pursuer: That as there are proper symbols established for the tradition of patronages, as well as of other real rights, so the general rule ought to obtain as to them, that the first infeftment completes the transmission; but whatever be the case of patronages in general, it is certain that such as have been annexed to lands, and transmitted by infeftment alongst with them, must continue to be transmitted in the same manner; and as the right to this patronage was established in the person of Sir Robert Innes by infeftment, so he could not be divested of it without infeftment taken on the contract or disposition.

* Lord Kames's report of this part of the case is *voce WRIT.*

" THE LORDS found, that Sir Robert Innes could not be completely denuded of the patronage in favour of the Bishop, without sasine following in the person of the Bishop."

The defenders having produced from the record, an extract of a sasine taken by the Bishop of Ross in 1637; the pursuer *objected*, That the sasine was null, because it did not bear the delivery of symbolical possession by the bailie to the attorney, by a psalm-book, the ordinary symbol for a patronage; but only bears in general, that sasine was given, the solemnities used in like cases being observed; and as such general clauses had often by the Court been found insufficient to support the executions of legal diligence, far less could they support an instrument of sasine.

Answered for the defenders; 1st, That it was but a modern invention to take infeftments upon patronages, and therefore there were no established symbols for giving such infeftments: None such are mentioned by Craig or Stair; and though in some instances we find a psalm-book given as a symbol for a right of patronage, yet sasines of such rights were often given without such symbols.

2dly, As the instrument bears that sasine was given *juris solemnitatibus in similibus fieri consuetis debite observatis*; this was sufficient, as has often been found in similar cases; particularly 21st March 1628, Maxwell against Portrack, *voce* SALMON FISHING, when the sasine of a salmon-fishing was sustained, though it did not bear *per traditionem Cymbæ et retis*, but only that the bailie came to the ground of the land and fishing, and gave state and sasine of the same.

" THE LORDS repelled the objection, in respect that the sasine bore, that the usual solemnities in the like case were observed."

The pursuer further *objected*, That the sasine was null, because the extract produced, and the copy in the register, wanted the *signum* of the notary which ought to contain his motto and name, and is his proper subscription: That a sasine was null for want of this, the LORDS found in 1731, in the case of the Creditors of Jordanhill, though the instrument was all wrote by the notary's own hand.

Answered for the defenders; That it appears from the copy in the register, and the extract thereof produced, that the principal instrument of sasine was attested and subscribed by the notary in the usual manner; the docquet, *Ego vero Gulielmus Lauder, &c.* being wrote by the notary's own hand. It is true, the *signum* and motto of the notary are not copied into the register; but it appears from a certificate from the keeper of the records in the lower Parliament house, that in the particular register of sasines for the shire of Inverness (in which record the Bishop's sasine is registrated) from 1636 to 1643, the notary's *signum* is not insert in any copy of a sasine in the register; but it is not from thence to be presumed that such was wanting in the principal instrument.

" THE LORDS repelled the objection."

On the second point, *viz.* if the pursuer's right be secured by the 6th act--

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Parl. 1695, it was *pleaded* for the pursuer, That by the said act it is statute, "That the purchaser at a judicial sale, paying the price offered to the creditors, as they shall be ranked by the Lords of Session, shall be for ever exonerated, and the lands and others purchased, disburdened of all debts and deeds of the bankrupt, or his predecessors, from whom he had right." That the pursuer purchased this patronage at the judicial sale of Sir Kenneth Mackenzie's estate, and is therefore secured by that clause of the act, from any deed done by Sir Robert Innes, from whom Sir Kenneth derived right. And to this it will be no good answer to say, that the Crown, in right of the bishop, does not claim upon any deed done by the predecessors of Sir Kenneth Mackenzie, but upon a deed done by Sir Robert Innes, whereby the bishop was preferable both to Sir Kenneth and to his predecessors; for it can make no difference whether the deed was done by one of the bankrupt's ancestors, or by one of his authors; the intention of the statute was to make the purchaser secure in all events, and so the LORDS have constructed it as often as the case has occurred, particularly 21st June 1720, John Chalmers against Sir Andrew Myreton, observed *voce* RANKING and SALE; and, in 1739, Bailie Dundas having purchased a tenement, at a sale carried on by the creditors of Thomas Wyllie, Lady Rollo claimed right to the tenement, her father having adjudged it from Henry Wylle, Thomas's younger brother, and represented that Henry's right was preferable, in respect that the right of Thomas proceeded from his father, and was under a faculty to alter, which the father exercised by disposing the tenement to Henry; yet the LORDS found that Mr Dundas's right was secured by the act 1695. The claim in that case was indeed founded on a deed of the bankrupt's father, but then the bankrupt did not derive right from him as heir, but by a singular title.

Answered for the defender; That as the King was not made a party to the process of sale, the decret of sale could not prejudice him; and it would be absurd and unjust, that the estate of a third party, who was not called, and had no opportunity to object, should be sold for payment of the bankrupt's debts; but by no statute is any such iniquity introduced. The design of the acts concerning the sale of bankrupt estates, is to transfer to the purchaser for the use of the creditors, the estate that truly was in the bankrupt; but not to create for their use any new estate or interest which never belonged to them. And the chief scope of the act 1695, is to provide in favour of the purchaser a method whereby he might pay or consign the price: And the meaning of the clause founded on by the pursuer, is that the purchaser so paying or consigning, shall have all right or title which belonged to the bankrupt or his predecessors, and that was descendible or competent to him, and which he or his creditors jointly had in their power to have made over to the purchaser by voluntary conveyances; but not that the purchaser shall be preferable to third parties, who may have derived a prior right to the lands, from a remote author of the bankrupt's predecessor, and who thereby had a preferable title to any that was

in the bankrupt himself. That this is the sense of the act, is further evident from the words that immediately follow in the same clause, viz. "And that the bankrupt, or his heirs, or apparent heirs, or creditors without exception of minority, not compearing, or conceiving themselves to be prejudged, shall only have access to pursue the receivers of the price and their heirs." All this provision is made in respect of the persons who were intitled to claim in right of the bankrupt himself; but there is nothing in the statute importing, that the estate of one not called in the process, can be sold for another man's debts.

"THE LORDS found, that the right of the Crown was not barred by the decret of sale."

Act. *Ferguson.* Alt. *Advocatus Boswel.* Reporter, *Kilkerran.* Clerk, *Gibson.*
B. Fol. Dic. v. 4. p. 53. Fac. Col. No 15. p. 30. and No 84. p. 124.

* * * This case was appealed :

"THE HOUSE OF LORDS ordered and *adjudged*, That such parts of the interlocutor 28th July 1753, as are complained of in the original appeal, (viz. those which sustain the objection, That the witnesses designations were not inserted in the body of the contract 1636), be reversed, and that the want of designation of the witnesses to the said contracts be repelled."

"Moved also, That the cross appeal be dismissed, and that such parts of the said interlocutors as are therein complained of (viz. those which repel the objections to the Bishop of Ross's sasine, and the plea founded on the act 1695) be affirmed."

* * * Lord Kames reports this case :

1752. February 27.—URQUHART of Meldrum having purchased the estate of Cromarty, and the patronage of the kirk of Cromarty at a public roup before the Court of Session, brought a declarator to ascertain his right to the patronage, which was called in question upon occasion of the settlement of a minister presented by him: and his titles were as follow:

Charter of resignation and *novodamus* anno 1588, by King James the VI. to Sir William Keith of the barony of Delny, containing an erection of the kirk of Cromarty and 18 other kirks into patronages, which formerly belonged to the chapter of the bishopric of Ross; granting to Sir William the teinds and patronage of these kirks, and uniting the whole into one barony, called the barony of Delny, upon which Sir William was infeft. This charter was ratified in Parliament anno 1592, and the subjects therein contained came by progress in the person of the Earl of Cromarty; and the patronage of the kirk of Cromarty was derived from him to Sir George Mackenzie, and was purchased as said is by the pursuer with the rest of Sir George's estate.

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In behalf of the Crown, it was *objected* against this progress, That this kirk of Cromarty, with the other kirks contained in the charter 1588, did anciently belong to the chapter of Ross; that by the act 2d, p. 1606, the bishops were restored to their original rights; and the chapters to theirs by the act 2d, p. 1617, with an exception only of such patronages as had been disposed by the king with consent of the titulars for the time, *i. e.* with consent of the chapters in this case; and consequently the grant of the above patronages to Sir William Keith being without consent of the chapter of the bishopric of Ross, is annulled by the said act 1617, and these patronages restored to the chapter in whose right the king now is.

In answer to this ground of preference for the crown, it was endeavoured to be made out in the first place, That by *titular* in the said act 1617, could not be meant the chapter. For by the establishment of the Presbyterian form of government, bishops were abolished as to their spiritual powers, though not as to their seat in Parliament, which was a civil privilege. And by the same establishment, chapters behaved also to be abolished. In the next place, it is pretty evident, that teinds belonging to bishops and their chapters were annexed to the Crown by the act 1587, though not mentioned directly in any clause of that act. This is proved *1mo*, By a clause in the same act, excepting from the annexation teinds belonging to parsons and vicars; * *2do*, By the authority of the act 1606, restoring bishops, in which it is expressly said, that by the act 1587, the teinds were annexed to the Crown as well as the lands; and by the authority of the act 192. Parl. 1593, to the same purpose. And indeed it behaved to be so, for otherwise teinds belonging to monasteries, teinds of common kirks belonging to chapters, &c. would be left *in medio* without a proprietor. Therefore, by the word *temporalities* in the act 1587, must be meant the whole patrimony of the church-teinds, as well as lands. These considerations make it evident, that by *titulars* in the act 1617, chapters could not be meant who had no existence at the time of that act, and who had no right to the teinds supposing them to have an existence.

In the next place, it was insisted upon positively, that by titulars in the act 1617, was meant the beneficed person, or the minister who served the cure for the time. This clause plainly refers to the act 176, Parl. 1593, declaring that dispositions granted by his Majesty of the patronage of a benefice without consent of the beneficed person, shall be null. The objection then resolves into this plain point, Whether the charter 1588, granted by the King to Sir William Keith is null. *quoad* the patronages upon the statute 1593, as wanting the consent of the person serving the cure for the time. This statute, it is true, has a retrospect; but then it can afford no objection, *1mo*, Because it takes place only with regard to benefices where the beneficed person is titular of the teinds, and not where the churches originally belonging to a chapter were at that time

* But *queritur*, What shall we say to the clause of the statute 1587? p. 530. at the top.

in the hands of the Crown in place of the chapter; *2do*, *Esto* the kirk in question were a parsonage, the objection is not applicable, unless it could be proved that there was an incumbent the time of the grant; *3tio*, Supposing this fact, the consent of the incumbent must be presumed *post tantum temporis*, which by the statute, is not required to be in writing; and, *lastly*, The Crown is cut off from this objection, by the negative prescription.

“ THE LORDS preferred Urquhart of Meldrum before the Crown.”

IN the declarator of the right of patronage of the kirk of Cromarty, at the instance of Urquhart of Meldrum against the Crown, to support which, there was produced a connected progress from Sir William Keith, to whom the King disposed this patronage *anno* 1588, by a charter upon which infeftment followed to Sir Robert Innes, who was also infeft *anno* 1631, and from him to the pursuer; it was *objected*, that Sir Robert resigned this patronage in the hands of the Crown, for a new infeftment to be granted to the bishop of Ross; that the King accordingly granted to the bishop a charter of resignation; and though this charter was never completed by infeftment, yet a patronage being an incorporeal right, it transmitted without infeftment; and the King in place of the bishop, is preferable before the pursuer, who could take no effectual right from Sir Robert, after Sir Robert was thus denuded in favour of the bishop.

In answer to this ground of preference, it was admitted, That a patronage being an incorporeal right, is incapable of being possest like lands; and therefore that the form of introducing the purchaser into possession, which is necessary to establish the right of property in lands, and is vouched by the instrument of sasine, cannot regularly obtain in this case. And upon this account, a device was fallen upon, both in England and Scotland, to annex patronages to land, in order to bring them under an infeftment; because the influence of custom was such, that people generally did not think themselves secure in the purchase of any subject without infeftment. But in process of time, when an instrument of sasine was universally substituted in place of actual possession, incorporeal rights crept into sasines, because in symbolical possession, the absurdity did not appear so glaring as it did formerly in the act of introducing a purchaser into the actual possession. By this means, offices, patronages, and other *jura incorporalia*, creeping into sasines, it came to be established in practice, that *jura incorporalia* might pass by infeftment; and with regard to a patronage in particular, a symbol was invented, and now they universally pass by infeftment.

2do, Whatever may be the case of a patronage which has never passed by infeftment, if there are any such, yet if a patronage has once been established by infeftment, it becomes a feudal holding, and must partake of the common nature of all feudal holdings, that the vassal is not denuded by resignation alone, but by new infeftment. And this must hold, more especially in the present case, where the patronage is disposed by Sir Robert to the bishop as a feudal

No 15. holding, and the bishop having taken right to this patronage by resignation, behoved to submit to the rules of the feudal law, and could have no complete right without infeftment.

"THE LORDS preferred Urquhart of Meldrum before the Crown."

Sel. Dec. No 6. p. 8. and No 7. p. 10.

1755. *January 8.* DONALDSON of Kinnairdie *against* OFFICERS OF STATE.

No 16.
Patronage
not compre-
hended under
any of the an-
nexing acts.

THE abbacy of Aberbrothock, to which belonged the patronage of the kirk of Aberarder, was erected by King James VI. in a temporal lordship in favour of the Marquis of Hamilton; and upon his resignation, was by Charles I. disposed to William Murray, afterwards Earl of Dysart, from whom Kinnairdie derived right. His right being controverted, he insisted in a declarator of the same against the Officers of the Crown. For them it was *objected*, That the abbacy of Aberbrothock having been comprehended under the general act of annexation 1587, the grant thereof by the King in favour of the Marquis of Hamilton, and the subsequent grant in favour of William Murray, were null and void. It was *answered*, That patronages were not comprehended under any acts of annexation; and, therefore, the objection is not good.

"THE LORDS, I think, unanimously preferred Kinnairdie to the patronage."

The history of the patronage of the church after the Reformation, appears to be this. The bulk of the subjects belonging to the church, teinds as well as lands, being under patronage; and the use for which these subjects were given to the church, having ceased upon the Reformation; it was thought that these subjects ought to return to the respective patrons, as being the presumed donors. All the subjects of which the King was patron were upon this principle restored to him; and all that were of church patronage went to him as *bona vacantia*. Laick patrons at the same time took possession of the subjects under their patronage. All this happened long before the act of annexation 1587, which is evident from the act itself, excepting from the general annexation many lands belonging to monasteries, formerly gifted by the Crown, and erected in temporal lordships. And with regard to patronages in particular, all of them, in the act 102d, Parl. 1581, are understood to be either in the Crown or in the laick patron; which shows, that even before the 1587, such patronages were transferred to the Crown.

We are not then to consider the act 1587 as the title which the Crown has to church lands, and other branches of its patrimony. The sole intention of this act was to annex to the Crown certain subjects which formerly belonged to the King. No subject is conferred upon the King by that statute save bishop lands. These are not only taken from the bishops and bestowed upon the King, but also annexed to the Crown. Church patronages were certainly in

the Crown long before the statute, and as these are not annexed, the King is under no limitation, but may dispose of them at his pleasure.

N. B. With regard to common kirks, such as M'Kenzie observes upon the act 199th, Parl. 1594, were not patronate, but like mensal churches were, from time to time, served by persons appointed, the King, after the abolition of popery, came, from the nature of the thing, to be also patron of these. And accordingly, by the statute now mentioned, these are appointed, like other benefices of cure, to be provided by presentation of the lawful patron.

Fol. Dic. v. 4. p. 53. Sel. Dec. No 72. p. 96.

1758. January 17.

GRAHAM of Balgowan against The OFFICERS OF STATE.

THE patronage of the parish and kirk of Monydie was part of the estate of the family of Gowrie.

Upon the forfeiture of the Earl of Gowrie for treason, his estate was annexed to the Crown, by act of Parliament 1600, cap. 2.; and by this act, 'all and sundry the lands, lordships, baronies, benefices, and others particularly above-mentioned, annexed to his Highness's Crown, are united to the lordship of Ruthven, then and in all time coming, to be called the lordship and stewartry of Huntingtower.'

In the year 1606, an act of dissolution was passed, whereby were dissolved from the foresaid annexation 'the hail lands pertaining or belonging to the said earldom of Gowrie and lordship of Ruthven, and in special the lands and lordship of Huntingtower, and the lands of Strathbran, that the same might be let in feu-farm, and heritably disposed, for payment of the old duty, with augmentation of the rental.'

By charter and infeftment 1607, referring to the above acts of annexation and dissolution, King James VI. granted in favour of James Graham of Balgowan, a feu of the lands of Nether-Pitcairn, and sundry others, particularly mentioned, 'una cum advocacione, donatione, et jure patronatus ecclesiæ parochialis de Monydie, rectoriæ et vicariæ ejusdem, cum omnibus et singulis censibus, decimis, &c.'—And a merk Scots is added in augmentation of the rental.

The acts of possession that have been had of this patronage by the family of Balgowan since the time aforesaid appear to have been as follow; 1mo, A presentation dated the 15th December 1662, granted by Balgowan, bearing, That Mr David Drummond, then minister at Monydie, did succeed to that parish as parson and vicar, after the decease of the last incumbent; and that the said Mr David being established there according to the law of the land for the time; and seeing patronages were revived by a late act of Parliament, giving power to all patrons to present ministers that have entered to their kirks since the

No 17.

Patronage, whether understood to be dissolved from the annexed property, along with the lands to which it was accessory?

No 17.

year 1694, or that should enter thereafter; therefore presenting the said Mr David Drummond, the then incumbent, to the parsonage and vicarage of the said kirk of Monydie; 2^{do}, A gift of the vacant stipends of that parish in 1694, granted by Thomas Graham of Balgowan, to certain gentlemen therein named, for building a new bridge upon the water of Schochie, and for the repairing the east bridge of Almond; 3^{tio}, A missive letter in 1698, wrote by Mr William Smith, late minister at Monydie, to Balgowan, bearing, That he, in obedience to a charge of horning given him, had removed himself from the manse; and that he had resolved to send his keys to his patron; and therefore desiring to receive from the bearer two keys, the one of the hall, and the other of the church; 4^{to}, In the year 1717, upon occasion of a vacancy in the parish, one Gilbert Gardiner, a trustee for Thomas Graham of Balgowan, offered a presentation in favour of one James Mercer; which, however, was neglected by the presbytery, who proceeded to moderate a call at large; and, *lastly*, In the 1754, Mr Patrick Meek having been settled minister, upon a presentation from the King, appearance was made for Mr Graham of Balgowan, and a protest taken, that his not exercising his right upon this occasion should import no acknowledgment of the Crown's right.

On the other hand, it appears, that the two last incumbents, viz. Mr Gilbert Man, in the 1738, and Mr Patrick Meek, in the 1754, were settled upon presentations from the Crown.

Mr Graham now of Balgowan, having brought an action against the Officers of State, for declaring his right to the patronage of this church of Monydie, did *insist*, That the said patronage had been properly and legally established in his ancestor by the charter 1607; that the same had been conveyed down by a connected progress to the present pursuer; and that he and his predecessors had uniformly maintained their right by exercising all the acts of possession which the nature of the thing could admit of; and consequently no dereliction could be presumed in favour of the Crown, whose first attempt to re-assume this right of patronage had been no farther back than the year 1738.

Answered on behalf of the Crown, There are no acts of possession on the part of the pursuer, or his predecessors, sufficient to support their title to this patronage, if their titles in themselves are not sufficient to carry the right to it. The presentation 1662 bears to be in favour of Mr Drummond, the then minister of Monydie; so it is plain, there was no vacancy. And at any rate, this presentation was a latent deed; no public act of possession had followed upon it; nor can it give any strength to a title invalid of itself. The only legal and public act of possession, or rather attempt to possess, upon the part of the pursuer, was the presentation of 1717; but which having been altogether disregarded, must go for nothing.

The question therefore falls to be determined altogether independent of possession; and, upon the part of the Crown, it is *maintained*, That this patronage was not legally conveyed to the pursuer's predecessor by the charter 1607; be-

cause, by the act 1600, it was unalienably annexed to the Crown, and neither was nor could be dissolved therefrom by the subsequent act in the year 1606. The practice of annexing forfeited estates to the Crown, and thereafter dissolving them for particular purposes, appears pretty early in the parliamentary proceedings of this country. Sometimes estates were dissolved from the Crown, with a view of being restored to those families or persons who had lost them by forfeiture, or given away to others the favourites of the Crown; and in such cases, the dissolution was commonly made as broad as the annexation, so as to comprehend every estate in the forfeiting person. But more generally dissolutions were made for encreasing the King's revenue, by feuing out the forfeited and annexed lands at an easy rent, though higher than formerly payable by the charters of the forfeiting persons; and when such was the intention, the practice always was, to restrict the dissolution to the lands only, without including offices, jurisdictions, or right of patronages, though such had belonged to the forfeiting person whose estate was then to be dissolved, and that although such particulars had been enumerated in the annexing act, as belonging to the forfeiting person. Thus, by the act 112th, Parl. 1487, act 90th, Parl. 1593, act 116, Parl. 1540, act 30th, Parl. 1587, and many others, it appears, that although lands, lordships, and baronies, with the advocations of their kirks, had been annexed to the Crown; yet the acts of dissolution speak of nothing but dissolving the lands, in order to their being feued out for the augmentation of the King's rental, and the increase of policy upon the lands themselves. These were the great objects in view; but as no improvement could be made upon patronages, and no rent could properly arise therefrom, so they are none of the things that were under the consideration of Parliament in these acts of dissolution. By act 1584, cap. 6. these annexed estates, when dissolved, could not be set in feu at a rent under the new retoured duty; but patronages have no retoured duty, therefore could not be meant to be feued out. And indeed, upon looking into the statutes regarding these matters, it appears, that the legislature seldom meant; that patronages once annexed to the Crown should be dissolved therefrom; for in very few instances is it done. And the reason is obvious; the vesting patronages in persons disaffected to the religion of the country, might have been of dangerous consequence to that peace of and unanimity in religion, so much wished for and desired in the earlier times. And therefore it was agreeable to the wisdom of the Legislature, when the right of patronages came once to be annexed to the Crown, to allow them to remain there.

This plan appears to have been followed in the present case. The act 1600 expressly annexes the lands, lordship, and barony of Ruthven, &c. with the teinds, advocacion, donation, and rights of patronage thereto belonging. The act 1606 simply dissolves the lands; it proceeds on a narrative, 'That considering the setting of the lands of the annexed property and fet-farm for payment of the old rental, with augmentation, is greatly to his Majesty's be-

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'profit and profit;' therefore the act dissolves 'the hail lands pertaining and belonging to the said earldom of Gowrie and lordship of Ruthven; and, in especial, the lands and lordship of Huntingtower, and the lands of Strathbran; and that to the effect that the samen hail lands might be set in feu, with an augmentation of the rental.' But no mention is made of the right of patronage; nor could it be in the view of the Legislature to dissolve any such right of patronage, which could yield no rent or profit by letting it in feu-farm; and therefore both the words and meaning of the act are limited to lands.

2do, et separatim, Supposing patronages had been comprehended in the act of dissolution, and thereby become alienable by the Crown, they still remain subject to the rules of law; and it is a rule introduced by act 1593, cap. 172. That patronages belonging to the Crown cannot be alienated without consent of the person enjoying the benefice for the time. In the present case it does not appear that any such consent was adhibited.

Replied for the pursuer, Rights of patronage have been in the law considered as accessory to lands, and a pertinent thereof, insomuch that it has been doubted, if a patronage could be granted without lands to which it was annexed. Where lands, therefore, to which a right of patronage has been always annexed, are in general terms conveyed, the patronage is understood to be included; nor is any separate sasine for the patronage necessary. In the present case, upon comparing the act of annexation with the act of dissolution, it is plain, that in the dissolving act, no reservation is made in favour of the Crown, but that the whole subjects are dissolved which had formerly been annexed. By the former of these acts, the whole subjects which had formerly been in the forfeiting person are united into one lordship, to be called the lordship and stewartry of Huntingtower. By the latter act, not the lands only, but the whole lordship is dissolved; which, in fair construction of language, must mean the whole particulars so united; and one of these particulars was the patronage of Monydie. The notion of the danger of patronages being in the hands of subjects, is of a very late date, and was not thought of for long after the time of the acts now under consideration. At that time, neither our Kings, nor our Parliaments, entertained any such thought; nor was there any instance of the Crown's giving away lands, and retaining patronages, as is now the custom. It cannot therefore be imagined, that the Legislature had any view of reserving this patronage unalienably to the Crown, when his Majesty was entrusted with the disposal of this great estate, consisting of so many lordships and baronies. Nor can it be believed, that the King and his ministers would, within the space of a few months thereafter, have granted a charter of the patronage, if it had not been clearly understood, that the same was dissolved as well as the lands.

Besides, the acquiescence of his Majesty's officers for such a tract of time, without ever bringing any challenge, either of this charter, or of the subse-

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quent rights in the pursuer's family, shows plainly the sense that was universally entertained with regard to the validity of these rights. In a question with a subject all challenge would undoubtedly have been cut off by the negative prescription ; and it does not appear that the Crown is in a different situation. The act 1600, cap. 14. declares, That the King shall not be prejudged by the negligence of his officers ; which relieves the Crown from all objections founded on the forms of judicial proceedings ; but does not deprive the subjects of the salutary relief of the negative prescription, as is observed by Sir George Mackenzie upon the said act, in respect it is a general remedy introduced for the quiet both of King and people ; and will not be presumed to be abolished by such remote implication. And at any rate, if such challenge could be competent after so long an acquiescence, the ground of challenge ought to be made *lucē meridiana clarius*, and not to depend upon imaginary conjectures.

With regard to the objection founded on the act 1593, cap. 172 (176) ; in the first place, it appears from the narrative of this act, as well as from Sir George M'Kenzie's observations upon it, that it related only to new rights of patronage granted by the King ; and therefore does not apply to the present case. And, *2do*, It is well known, that this act went into disuse soon after it was made, and no regard has ever been had to it ; accordingly, in a very late case, the very same objection which is now made was solemnly over-ruled, January 1749, Cochran of Culross *contra* the Officers of State, No 11. p. 9909.

' THE LORDS found, that Balgowan had right to the patronage of the kirk of ' Monydie,'

Act. *Craigie, Dav. Grame, Ferguson.* Alt. *King's Counsel.* Clerk, *Gibson.*

W. 7.

Fol. Dic. v. 4. p. 54. Fac. Col. No 87. p. 151.

1762. February. LADY DOWAGER FORBES *against* Mr JAMES M'WILLIAM.

No 18.

IN 1720, a contract of marriage was entered into betwixt William Lord Forbes and the Lady, by which she was provided to a total liferent of the estate of Forbes, including the patronages.

In 1731, after her husband's death, she was infeft in the estate, but not in the patronages.

There was only one son of this marriage, Lord Francis, who succeeded his father in 1730, and, dying in 1735, was succeeded by his uncle, James Lord Forbes, who took infeftment in the whole estate, patronages included. Lady Forbes, after her husband's death, executed certain deeds, first in favour of her son, Lord Francis, and thereafter in favour of her brother-in-law, Lord James, which had the appearance of renouncing any right she had by her contract of marriage to the patronages ; and, for several years, Lord James, with her

A minister settled by a *fiar* whose right to the patronage was afterwards found invalid, was found not entitled to the stipend, altho' duly settled by the presbytery.

No 18. knowledge and her consent, presented to all the vacant churches belonging to the family, and exercised every other right of patronage.

In 1752, Lady Forbes was infeft in the patronages, upon the precept contained in her contract of marriage.

In 1757, the parish of Forbes became vacant; and, upon the 24th January that year, James Lord Forbes gave in to the presbytery a presentation in favour of Mr M'William, and Lady Forbes another in favour of Mr William Copland. Lord Forbes had presented two ministers to this parish since his brother's death, the one in 1742, and the other in 1745.

After some proceedings before the presbytery and synod, the General Assembly, in May 1757, appointed the presbytery to proceed to the settlement of Lord Forbes' presentee; and he was settled accordingly the August following.

In March 1757, Lady Forbes brought a process before the Court of Session, for declaring her right to the patronages; and, 2d August 1758, the Lords found, that she had not the right of presenting ministers; but, upon an appeal, this judgment was reversed, 18th February 1760.

In 1762, Lady Forbes, being charged by Mr M'William for payment of the stipend, brought a suspension; and, upon the 14th July that year, the Lord Ordinary sustained the reasons of suspension.

Pleaded in a reclaiming petition:

When churches become vacant, and the right of patronage is controverted, it is the duty of the presbytery to prefer the presentee of the patron last in possession. It is impossible, in such cases, to wait till the right is determined in the courts of law; because this might keep churches vacant for years, which might be attended with the greatest inconveniencies.

That this is law, appears from the following authorities: Reg. Maj. lib. 3. cap. 33. § 1. 2. 4. 5. 6. Glanville, lib. 13. cap. 20. Decretal, lib. 3. tit. 38. cap. 19. Sir George M'Kenzie's Observations on Act 7. 1567. Lord Bankton; v. 2. p. 32.

Lord Forbes had been in the uninterrupted possession ever since his nephew's death, had presented to all the churches belonging to the family that had become vacant, and particularly, had presented the two last ministers to the parish in question, with the knowledge and consent of Lady Forbes, and she had concurred in the calls as a liferentrix.

This case is the clearer, because the Court of Session found, that Lady Forbes had not the right of patronage. It is plain therefore, in every view, that the General Assembly did right in preferring Lord Forbes' presentee. They did so *optima fide*; and, therefore, Mr M'William must retain the benefice, whatever was the event of Lady Forbes' process. Lord Forbes, when he presented, was certainly a *bona fide* possessor; and consequently *fructus precipiendo suos fecit*; and his interim exercise of the right of patronage must be good,

even though the judgment of the Court of Session sustaining it was afterwards altered by a superior court. No 18.

Answered for Lady Forbes; Her right of retaining the stipend is founded on the act 115th 1592, and the decisions, Moncrieff *contra* Maxton, 14th February 1745, see APPENDIX; Cochran *contra* Stoddart, 26th June 1751, *infra*, h. t.; and the Crown *contra* Dick, 2d March 1753, *infra*, b. t. The rule of the statute is general, without distinguishing whether the patron was in possession or not. The inconveniencies are the same; and therefore, there is no occasion for making such distinction. As her husband was infest, his possession and his brother's was in law her possession; and though she could not present, so long as her right remained personal; yet, so soon as it was completed by infestment, she was entitled to exercise every right of patronage. The authorities quoted are against the petitioner. It is a rule, that, when there is any controversy about the right of patronage, the ecclesiastical courts must stop till it is determined. The case of the authorities is, when a supposed patron presents *bona fide*, and afterwards his right is reduced; but here there was a dispute, or rather, it was clear in favour of the respondent.

"THE LORDS adhered."

For the Petitioner, *Ferguson et David Dalrymple.*

Alt. Montgomery.

Fol. Dic. v. 4. p. 48. Fac. Col. No 81. p. 178.

1762. February 26.

SIR DAVID CUNNINGHAM, Baronet, *against* WILLIAM WARDROP, MR JOHN WARDEN, JAMES WADDEL, and Others, Heritors and Inhabitants of the Parish of Whitburn.

THE parish of Livingstone, in the presbytery of Linlithgow, being anciently of considerable extent, the presbytery, in the year 1650, upon a petition from the inhabitants, declared, that the parish was a sufficient charge for two ministers; and they described the limits for a new parish, and fixed upon a place for building a church; but there was then no fund established for that purpose.

In the year 1719, a number of heritors and inhabitants of the parish made a subscription for raising a fund sufficient for endowing a church, and maintaining a minister; and, for that purpose, entered into a deed of mortification, whereby they gave, granted, and doted particular sums of money for a maintenance to a minister, for building a new church, for purchasing ground for a church-yard, for a manse, for a glebe, &c. By the same deed, they put this new endowed church, &c. under the management of the heritors and kirk-session; and they declared that the ministers should be chosen by the whole heads of families, &c. residing in the parish, qualified in manner mentioned in the deed, excluding hereby all patrons and other persons, expressly, whatsoever,

No 19.

Does a patron's right of patronage continue over the whole, where part of an old parish is erected into a new one?

No 19.

from the power of presenting or nominating any person whatever to be minister of the said parish ; as also, from the disposal of the foresaid stipend, or other parts of the produce of the aforesaid mortified funds, in times of vacancies.

In 1731, an action was brought before the Court of Session, as Commissioners for plantation of kirks and valuation of teinds, at the instance of most of the heritors, against Sir James Cunningham the pursuer's brother, and George Dundas, who both pretended right to the patronage of the parish of Livingstone, in order to obtain a legal disjunction of the new parish from that of Livingstone, and a decree of erection of the said new parish.

In this cause, a consent from Sir James Cunningham, as patron of the parish of Livingstone, to the new erection, was produced, with this provision, that it should not prejudice his right to the tithes either of the parish of Livingstone, or the parish to be erected, or the management thereof, during the vacancy of either of the said parishes.

George Dundas also consented, under protestation, that his consent should not prejudice any right he might have to the patronage.

Upon the 23d June 1731, the Lords disjoined the new parish from the old, and erected the same into a separate parish, to be called the parish of Whitburn. Mr Wardrobe was elected minister of this parish in the end of 1731 ; and, upon his death, which happened in 1759, Mr William Porteous was chosen minister by the parishioners ; and at both these elections, Sir James Cunningham at the first, and the pursuer at the second, had given in a presentation in favour of the person elected by the parish ; which presentation had been each time refused.

In the 1760, Sir David Cunningham brought a process of declarator, for having himself declared to be patron of the parish, and entitled to the vacant stipends.

Pleaded for the pursuer ; That his predecessors being patrons of the whole parish of Livingstone, no new erection could deprive him of any part of his right, and the new parish must be still subject to his right of patronage, as was decided in the case of the parish of Haddington, 18th Nov. 1680, No 6. p. 9901.

That the rent of the lands allocated for a stipend to the minister of Whitburn, not being above 750. merks, which is less than the *minimum* appointed by law, the minister, who had brought an action for augmentation of the stipend, must be entitled to such augmentation out of the tithes of the parish, to which the pursuer as patron had right, and he could not be obliged to pay such augmentation to any incumbent not admitted upon his presentation. That the rules laid down by the deed of endowment for calling the minister of this parish, destroyed the subordination that ought to take place in well ordered societies, tended to render settlements inextricable, and must be productive of perpetual dissension : And that, in the process 1731, for erecting the new parish of Whitburn, no notice having been taken of the deed of foundation, nor pre-

tence made of its giving a title to the patronage, the deed seemed to have been laid aside and derelinqished by the parties entitled to claim under it.

Pleaded for the defenders; That the patron's right must either arise *ex collatione fundi, ex constructione ædis, aut ex donatione ecclesiæ*; but neither the pursuers nor his predecessors contributed to any of these; the whole endowment arose by the bounty of voluntary subscribers, under whom the defenders now claim; and therefore the right of presentation by the rules of law ought to belong to them: That the original subscribers had a right to annex what qualities and conditions they thought fit to their donation; and they had expressly reserved the right of presenting the minister; and that the act 1633. c. 6. expressly enacts, ' That it shall no ways be lawful to alter, change, or invert any pious donations to any other use than that specific use whereunto they are destinate by the disponent himself: ' That the pursuer's right of patronage over the church of Livingstone, which his predecessor endowed, remained entire, notwithstanding the new erection: That the case of the parish of Haddington, quoted for the pursuer, was a contribution for a second minister in an old parish church, without any reservation concerning the patronage, the presumption was strongest in favour of the patron of the church: That the minister's action against the heritors for an augmentation of the stipend, is but a device to aid the pursuer; for this minister having accepted a settlement, endowed by a private foundation, limited to the fund established by the founders, could not be entitled to an augmentation by law out of the tithes: And, even if the minister should succeed in his demand, almost the whole of the new burden would fall upon the defenders, which surely could be no reason for depriving them of the right of calling the minister, &c: That the mode of election of a minister appointed by the deed of foundation, is subject to no inconvenience, and differs very little from the method appointed by the act 1690 c. 33: And, even if the mode of election was inconvenient, the right of the patron of the old church, who is expressly excluded, could not take place; but the election would fall to be regulated pursuant to the said act 1690: That there was no foundation for the pursuer's pretence, that the founders or heritors of the parish had relinquished their claim of presenting the minister: That in the action 1731, for the erection of the parish, reference was plainly made to the funds established for the foundation, to the manner of raising that fund, and to the rules laid down for calling a minister, &c; all which are also expressly referred to by Sir James Cunningham's deed of consent to the new erection; and the election of a minister has regularly proceeded according to those rules since the erection of the parish.

THE LORDS, upon the report of Lord Minto, " found, that Sir David Cunningham had the right of patronage of the parish of Whitburn, and of presentation of a minister to the said parish; and that he had also right to the administration of the rents of the lands purchased for a stipend to the minister during a vacancy."

No 16.

But, upon a reclaiming petition and answers,

THE LORDS "sustained the defence, and assoilzied from the declarator; preferred the defenders to the right of administration of the rents of the lands purchased for a stipend to the minister during a vacancy; and decerned."

Reporter, *Lord Minto.*Act. *Advocatus.*Alt. *M^cQueen.*

J. M.

Fol. Dic. v. 4. p. 50. Fac. Col. No 83. p. 131.

* * * This case was appealed.

THE HOUSE OF LORDS ORDERED, that the judgment of the Court of Session should be reversed.

1765. February 13.

WALTER LORD TORPHICHEN *against* Mr GILLON of Walhouse.

No 20.

A patron, upon the building of a new church, has a preference in the choice of his seat, though his interest in the parish be trifling, and the other heritors pay in proportion to their valuations.

THE old church of Torphichen having been taken down, and a new one erected, the area of the church, of course, came to be the subject of division. His Lordship was undoubted patron and titular of the teinds in the parish, in virtue of grants from the Crown to his family, whereby he and his ancestors were vested, as coming in the place of the preceptor, with the property of the lordship and barony of Torphichen, and all the privileges thereto belonging. He was also superior of a considerable part of the parish, of the most part of which he was formerly the proprietor, though his property at present therein was but trifling. When the heritors convened, his Lordship insisted, that he, on account of his pretensions, as above stated, was well entitled to the first choice of a seat; and, *2dly*, That he had right to a seat of the same dimensions with the one that had been possessed by his family, from time immemorial, in the old church in Torphichen. Mr Gillon, on the other hand, and the rest of the heritors, were of opinion, that, as the new church was built by the heritors in proportion to their respective valuations, the extent of their valuations must determine the preference of choice, and likewise the *quantum* which fell to be allotted for the accommodation of each heritor; and that, as Mr Gillon succeeded to the Earl of Hopeton, who formerly had the highest valuation, he was therefore entitled to the same preference Lord Hopeton would have had, if he had not disposed his right to him. The bone of contention between the parties was, which of them should have possession of the only aisle in the new church, opposite to the pulpit, as being not only the most respectable situation, but likewise best calculated for having a full view of, and being well viewed by, the congregation.

"THE COURT, in respect that Lord Torphichen was patron of the parish, titular of teinds, and an heritor in the same, found him entitled to the first

choice of a seat in the church, and likewise of the dimensions claimed by him." No 20.

A. C.

Fol. Dic. v. 4. p. 54. Fac. Col. No 7. p. 13.

1772. June 16. SNODGRASS, &c. against LOGAN.

No 21.

WHERE the patronage of a kirk is lodged in a collective body, which having differed in choice, splits into two parties, and each party gives a separate presentation, the Court of Session is competent to decide which shall be preferred.

Fol. Dic. v. 4. p. 51. Fac. Col.

*** This case is No 95. p. 7374., *voce* JURISDICTION.

1777 July. BRODIE of Lethem against EARL of MORAY.

No 22.

Alternate right to present.

THE parish of Kinloss had been erected in 1661, out of parts of the two adjoining parishes of Alves and Rafford, whereof the patronage of the former belonged to the Earl of Moray, and that of the latter to Brodie of Lethem and Lord Spynie alternately. Mutual declarators were brought by the Earl and Miss Brodie of Lethem, to ascertain the right of patronage on a vacancy in 1777; and the Duke of Gordon, in right of Lord Spynie, sisted himself in the process. *Urged* for Miss Brodie, That she was unquestionably entitled to an alternate right to presentation, agreeably to act 1621, c. 5. and 1617, c. 3.; and the Earl of Moray having confessedly presented the last minister, it was now her turn. *Contended* for the Earl, That supposing Miss Brodie to have had the sole right to the patronage of Rafford, instead of only an alternate right with Lord Spynie, she could not now claim a title to any part of the patronage; for two thirds of the stipend is paid out of lands in the old parish of Alves, where the church itself is situated. At any rate, the Earl's right is established by the positive prescription, and that of Miss Brodie cut off by the negative. The first minister was settled by popular call in 1657, while patronage stood abolished; the second was presented by the Earl of Moray in 1665; the third in 1670, in virtue of a letter from the Bishop of Moray, which it may be presumed, was in consequence of a presentation from the Earl; the fourth was settled while patronage again stood abolished by law; and the last incumbent was presented in 1750 by the Earl of Moray, although Brodie of Lethem, now for the first time, protested, that his right should not thereby be prejudiced. *Answered* for Miss Brodie, That the only act of presentation by the Earl of Moray, except the last, was that in 1665; the next, in 1670, there was equal reason to presume had been in consequence of Lethem's presentation as that of

No 22.

the Earl. The last by the Earl, in 1752, was protested against by Lethem, which clearly interrupted any prescription. At any rate, there was no room for prescription in the present case; for as the Earl's title could give him only an alternate right, so that could never be a title to acquire the sole right. THE LORDS found Miss Brodie entitled to this vice of presentation. See APPENDIX.

Fol. Dic. v. 4. p. 50.

No 23.

Right of the patron to present by a commissioner.

1778. *January 22.* THOMAS TAIT *against* GEORGE SKENE KEITH.

THE late Earl Marischal having his residence in a foreign country, committed the management of his affairs in Scotland to Messrs Alexander Keith, elder and younger; and the commission under which they acted contained a special power to grant presentations to the churches whereof he was patron.

In 1776, the church of Keith-hall, in the gift of Lord Marischal, became vacant. Two presentations were granted; one on the 9th May, in favour of Skene Keith, by Lord Marischal's commissioners, who had previously received a letter from him, desiring them to present Keith. This presentation was transmitted next day by post to the presentee. The other was executed on the 10th May by Lord Marischal himself at Potsdam, in favour of Thomas Tait, and was on the same day transmitted by post to his commissioners, but without instructions to forward the presentation to Tait. The commissioners having already presented Keith, sent it back to the patron at Potsdam, from which it was afterwards transmitted to the presentee.

After some procedure in the church-courts, mutual declarators were brought at the instance of Keith and Tait, for ascertaining the preference of their respective presentations.

Pleaded for Tait; 1mo, The power of presenting cannot be delegated to a factor. It is a faculty personal to the patron. In no statute or law-book is mention made of presenting by a commissioner or factor.

The act 10th Anne, c. 8. obliging the patron to qualify, proceeds on this principle, that the right of presenting cannot be delegated. By that statute, § 6. and 7. the patron is strictly required to take the oaths to government; and, if suspected of popery, to subscribe the formula, before presenting, otherwise the presentation is declared to be null.

If it had been lawful to present by a factor, the act of Parliament, in order to prevent these regulations from being defeated altogether, would have required the same oaths to be taken by the factor presenting, as by the patron when he presents. But, as it was understood to be the law, that the factor could not present, this was unnecessary. Accordingly, in practice, no popish patron attempts to present by a factor; and it is always thought necessary that the patron, who does not chuse to take the oaths required by the statute, should

dispose the right of patronage itself, *pro hac vice*, to one who will comply with the law in this respect. Because the power of presenting cannot be delegated, crown-presentations must proceed on a sign-manual, though the crown-acts by its commissioners, the barons, in disposing of vacant stipends, and exercising every other right consequent on patronage.

2do, Supposing it lawful to present by commissioners having special powers, commissions of that kind are, from their nature, revocable, either expressly or tacitly. Lord Marischall, by presenting himself, virtually revoked, in that instance, the general commission to the Messrs Keiths; and the presentation by him, as it was granted before any thing had followed on that by the commissioners, must be preferred, as the true choice and nomination of the patron. The presentation by the commissioners is not to be considered as even prior to the other; for, though it is earlier in date, both must be held as delivered at the same time, both having been put into the post-office on the same day.

Pleaded for Skene Keith; *1mo*, The right of patronage is a patrimonial right *in commercio*, and the power of presenting is a branch of it. It is not disputed that the patron can exercise all the other branches and pertinents of this right by a factor, such as uplifting and discharging the vacant stipends, tithes, &c. —There is no solid reason given for making an exception of the power of presenting.

There was no need to notice the case of a factor presenting in the statute 10mo An. c. 12.—As the patron, from whom the right flows, must be qualified, it is immaterial whether the commissioner is so or not. In the present instance, both patron and commissioners were qualified.—Law-books may not have laid down *totidem verbis*, that a patron can present by a factor specially empowered. But, in cases where doubts might possibly arise, the law-books are not silent. It is said the tutor may present, in name of the pupil, the husband as administrator for the wife, &c. Bank. v. 2. p. 37. § 100.—Crown-presentations require a sign-manual, because it was not judged expedient for the Crown to delegate the power of presenting to the Barons, whose offices are for life, and not from any doubt that the power of presenting might be delegated.

The usage was said to be in favour of this plea, and that it was a common practice among patrons residing abroad, to present by commissioners, having special powers.

2do, The presentation by the commissioners is the prior presentation. It is confessedly so in date. As to the delivery, the two presentations were put into different post-offices on the same day; but that of the patron was then transmitted by him only to his commissioners, and not to the presentee. It must, therefore, be held as remaining in the custody of the patron, until, upon being sent back, it was afterwards transmitted from Poisdam to the presentee. But the presentation by the commissioners was in the hands of their presentee before that time; consequently it is prior in point of delivery.—In every question with a posterior presentation by the patron, it must be considered as the pre-

No 24. presentation of the patron himself. It is, therefore, of no moment, that Skene Keith was not *de facto* settled by the church before the presentation to Tait. The patron was *functus*, as well as the commissioners, by the first, and no effectual presentation could thereafter be granted by either.

In this case each party *alleged*, That undue means had been used in obtaining the other's presentation; and, in the action at the instance of Tait, this was made a ground of reduction. But the cause was determined by the Court solely on the ground of law.

The COURT were unanimously of opinion, that a patron may delegate his power of presenting to a factor. They found, 'That the Messrs Keiths, having full and special power by commission from G. Keith, late Earl Marischal, to grant presentations to parish-churches, whereof he is patron, in the same manner he could do himself; and having granted a presentation, as commissioner aforesaid, to Mr Skene Keith, to be minister of this parish, which was prior to a presentation to the same parish, granted by the Earl himself to the said Thomas Tait; therefore, in a competition betwixt the two presentees, found the presentation to Keith preferable.'

For Keith, *D. Rae, G. Ogilvie.*

Alt. Advocate, Crosbie.

Fol. Dic. v. 4. p. 49. Fac. Col. No 6. p. 11.

* * * This case was appealed :

THE HOUSE OF LORDS ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors complained of be affirmed.

1778. June 30. EARL OF HADDINGTON *against* The OFFICERS OF STATE.

No 25.

Title in the Lord of Erection to the patronage of a church annexed to the benefice.

THE church of Coldstream having become vacant, two different presentations were given, one by the Crown, and the other by the Earl of Haddington. The Earl soon after brought a declarator of his right of patronage, in which he called the Officers of State.

Pleaded for the pursuer; The lands of Coldstream, and the churches therein situated, formerly belonged to a convent of Cisterians, and, upon the reformation, were annexed to the Crown.

In the year 1621, an act passed for dissolving the priory of Coldstream from the Crown, and erecting it into a barony in favour of Sir John Hamilton, third son of the Earl of Melrose; and this act was followed by a charter from the Crown to him of the subject. Sir John, thereafter, conveyed the whole grant to his father, who was the predecessor of the pursuer.

In the act 1621, the subjects dissolved from the Crown, are described to be the priory of Coldstream, and the benefice thereof, 'with all lands, kirks, teinds, &c. pertaining to the said priory, as well the temporality as the spirituality of the same; and specially, all and hail the lands, &c.; also the teinds, parsonage and vicarage, of all and sundry the kirk and parish of Coldstream, pertaining to the said priory of Coldstream, as a part of the spirituality of the same, with all other kirks and teinds pertaining to the said priory, as spirituality thereof.'

As the teinds of the parish of Coldstream were part of the spirituality of the priory, the person serving the cure in the church of Coldstream, must have been a vicar named by the prior and convent.—The right of the ecclesiastical titular, in such a case, to supply the cure of the annexed benefice, was not, in strict language, a right of patronage; the titular himself being, in effect, parson of the parish, and the vicar only a substitute. But, when the large benefices were given away to lay titulars, this right of presenting to the annexed benefice became a proper right of patronage in the lay titular, and was exercised and transmitted as such; Sir G. M'Kenzie, Obs. on a. 1594, c. 196.; St. Inst. B. 2. t. 8. § 34.; Bank. B. 2. t. 8. § 18.—Under the terms, therefore, of the grant to the priory of Coldstream, above recited, the patronage of this church was effectually conveyed to the Lord of Erection. The words, 'advocation, donation, and right of patronage,' do not occur in the grant, But those used were more proper in the circumstances of the case. The Crown's right being of the same nature with that which formerly belonged to the beneficed person, the proper mode of conveying it was under the general description of the kirk, and the teinds thereof. It was by having a right to these that the Crown had the consequential privilege of naming an incumbent.

No particular words were necessary; the grant of the benefice, *per nomen universitatis*, includes all its parts and privileges, and, consequently was sufficient to carry the patronage of this church; St. Inst. B. 2. t. 8. § 34.

Answered for the defenders; There is no conveyance of a right of patronage in the titles produced: There is not even any grant to the kirk of Coldstream *nominatim*. But, though a grant to this kirk were to be held as included under the general conveyance of kirks, such a grant carries the teinds or spirituality of the kirk, but not the right of patronage. It may be true, that, before ministers had right to the fruits, the Lords of Erection, under the colour of this title to the kirk, may have put in vicars to serve the cure, as the ecclesiastical titulars were in use of doing; but, as soon as ministers came to have right, by statute, to a certain stipend out of the great teinds, the nomination to the office of minister was in the Crown. It required an express conveyance of the *advocatio donatio ecclesiæ* from the Crown, to vest the right of presentation in the Lord of Erection, and it was not carried by his grants to the benefice. This, it was said, seemed to be the opinion of Lord Stair, Inst. B. 2. T. 8. p. 320.

No 25.

The pursuer likewise *pleaded* a right by prescription to this patronage upon his possession. But that point did not receive any express judgment; the Court being unanimously of opinion, that the titles produced were a sufficient legal conveyance of the patronage of this church to the pursuer's predecessors.

THE LORDS found, that the pursuer has an undoubted and exclusive right to the advocacy, donation, and right of patronage and presentation of ministers to the said kirk and parish of Coldstream.

Act. *Ilay Campbell.*

Alt. Lord Advocate, Sol. General, Sol. of Tithes.

Fol. Dic. v. 4. p. 48. Fac. Col. No 25. p. 45.

No 26.

1783. February 22. JAMES MURDOCH against ALEXANDER GORDON.

Found in conformity with Donaldson against Officers of State, No 16. p. 9926. that the patronages of churches came not under the general act of annexation in 1587.

MR MURDOCH, preacher of the gospel, obtained from the Crown a presentation to the parish church of Crossmichael; a church, to the patronage of which Mr Gordon of Culvenan likewise laid claim. Of the Crown's right to this patronage a process of declarator was brought, in the name of Mr Murdoch alone; the counsel for his Majesty, deeming that of Mr Gordon preferable to it, having declined to concur in the action.

Mr Gordon's right was derived from a charter of King James VI. in 1593, containing, among other subjects, the patronage in question. This charter, however, being posterior to the general act of annexation, Mr Murdoch contended, that a previous dissolution in Parliament was necessary to render it an effectual grant of the patronage. The point therefore on which the fate of the competition chiefly * depended was, Whether rights of patronage were to be understood as comprehended in the property of the Crown thus annexed. The Court having appointed a hearing of the cause in presence, it was

Pleaded for the presentee of the Crown: The statute of 1587, cap. 29. is thus entitled: 'Annexation of the *temporality* of benefices to the Crown.' The term *temporality* here plainly denotes such rights as were held by virtue of the temporal law, that is, the common law of the realm; and stands in contradistinction to that of *spirituality*, by which, prior to the Reformation, the clergy denominated tithes; these being as they supposed, possessed *jure divino*, independently of any human or temporal appointment. This pretended *jus divinum*, however, having after that event been reprobated as unchristian, or absurd, the consequence was, that though all the parts of the Popish benefices, as *bona vacantia*, had equally devolved to the Crown, yet the act of Parliament above mentioned, framed for rendering them its annexed property, was confined to the temporality alone. It being unjust to comprehend in like manner their *spiritu-*

* There were other topics introduced, which proved immaterial in the cause, particularly one respecting the effect of a private act of ratification, in the event of patronages being found to have come under the annexation.

ality, the foundation of the right to which had been thus shaken, this was reserved from the annexation, still alienable, and open to future disquisition; though perhaps an exception is to be made of the teinds of prelaties and of kirk-lands, agreeably to the statute of 1593, cap. 192. But, under the denomination of *spirituality*, could not be comprehended rights of presentation, which no churchman ever imagined to belong to the church *jure divino*. Among the other temporal subjects therefore which fell under the annexation, patronages of churches are undoubtedly to be classed. Indeed the power of presenting was not the only temporal right which belonged to the patrons; they were likewise entitled to enjoy the lands, and other temporal property of benefices, during their vacancy.

The subsequent statutes accordingly refer to the annexation of patronage. Thus that of 1606, cap. 2. concerning the restitution of the estates of bishops against the general act of annexation, specially mentions patronages among the subjects annexed. In the statute likewise of 1633, cap. 9. entitled, *The King's general revocation*, and which recalled all alienations of benefices that had been annexed to the Crown, 'patronages of kirks' are expressly denominated as such; and in the act, the 12th of the same year, a similar expression is used thus: 'Patronages and benefices formerly belonging to the kirk, and since annexed to the Crown.' In a variety of instances too of acts of dissolution, framed for the purpose of erecting new benefices, patronages are found expressly dissolved; such as that in favour of the bishop of Edinburgh in 1633, and that which appeared in the lately decided case of the Crown and the Earl of Haddington relative to the parish of Lennel, (See APPENDIX.) The opinions of lawyers correspond to these proofs. Thus Lord Stair, B. 2. Tit. 8. § 35. says, 'There are patronages which by act of Parliament are annexed to the Crown, either expressly, or when baronies, lordships, or benefices, are annexed.' And the observation is repeated by Mr Erskine, B. 1. Tit. 5. § 10.

Answered, To create a permanent addition to the revenues of the Crown, which by the profusion of our princes had been greatly diminished, was undoubtedly the object of the statute of 1587, as of all the other acts of annexation; and accordingly in the preamble of that statute it is expressly so declared. But as, by the accession of mere rights of patronage, the royal treasure could never be increased, it was surely not to be expected that these would be found in the property annexed, and which too is denominated the *temporality* of benefices; an appellation confined to subjects of revenue, exclusively of patronages, and all other unproductive rights; as at the same time it likewise distinguished that revenue which arose from lands and other temporal sources, in opposition to teinds claimed by the church *jure divino*. In the minute and prolix enumeration accordingly of the subjects of annexation which the enacting part of the statute contains, not a hint concerning patronages is to be discovered; for though it descends even to trifling particulars, still they are of a nature to afford a lucrative product.

No 25.

That in fact patronages were not so annexed, is farther apparent from several posterior statutes. Thus the act of Parliament 1593, cap. 172: (176.) declares the consent of beneficed persons alone, without the aid of dissolution, sufficient to give validity to alienations by the Crown, of rights of patronage. For the same reason, the act of 1617, cap. 2. excepts from the patrimonies thereby restored to chapters of cathedral churches, those patronages which since the annexation had been alienated by his Majesty; an absurd provision surely, if they had been regarded as part of the Crown's annexed and unalienable property. Nor is the statute of revocation in 1633 inconsistent with these enactments; for it relates not to patronages in general, but a few particular instances of annexation *per expressum*, which it belongs not to the present argument to controvert; as indeed they rather fortify it, by showing the necessity of an express enactment on the subject. This doctrine is confirmed by the authority of Sir Thomas Hope, tit. *Of Kirks and Benefices*, § 4. 5.; and by that of Lord Bankton, B. 2. Tit. 8. § 90.; while the above quotation from Lord Stair is confined to those special cases, and to the annexation of baronies including patronages.

In truth, the notion itself of the annexation of patronages would perhaps have never occurred, but for the zeal of Sir George M'Kenzie in strengthening the hands of his Sovereign, against the influence of those whom he calls 'schismatic private patrons;' persons, in the disastrous times preceding the Revolution, attached to the cause of that civil and religious freedom which was established at that æra. In his observations on the general act of annexation in 1587, he mentions the case of Stewart *contra* the Laird of Waterstoun, (See APPENDIX.) in which, he says, the question was agitated, but not decided. As, however, he assigns no reason for this, it may be fairly presumed to have been no other than his own foresight of an event opposite to his wishes. From that period to the present time, except in one instance, the idea has never been revived; a case, that of Donaldson *contra* the Officers of State, January 8. 1755; which furnishes a direct precedent for the present, as it was there decided by the Court, that patronages did not fall under the acts of annexation, No 16. p. 9926.

Replied; Though the opinion of the learned reporter of the last-mentioned decision seems adverse to the annexation of patronages, yet, from inspection of the papers in that cause, it appears not to have been determined on that principle; concerning which, from the number of specialities in the case, it was unnecessary to give judgement.

The majority of the Court, upon the grounds above stated, were of opinion, that church patronages were not included under the general act of annexation; and therefore that any subsequent alienation of them by the Crown could not require dissolution in Parliament to render it effectual. So that the charter founded on by Mr Gordon was, notwithstanding the objection of there having been no previous dissolution in Parliament, sustained as a valid grant of the patronage in question.

THE LORD ORDINARY had found, ' That the defender Alexander Gordon had the preferable right to the patronage in question ;' and

' THE COURT having heard parties procurators in their own presence, adhered to the interlocutor of the Lord Ordinary.

A reclaiming petition against this judgment, to which an additional one was joined, were, on being advised with answers, both refused.

Lord Ordinary, *Ankervilla*.
Clerk, *Orme*,

Act. *Ilay Campbell, Crosbie*.

Alt. *Blair, R. Dundas*.

S.

Fol. Dic. v. 4. p. 53. Fac. Col. No 95. p. 147.

1788. February 7. HUGH GRANT *against* The DUKE of GORDON.

No 26:

IN 1726, a vacancy in the united parishes of Moy and Dyke had been supplied in consequence of a presentation from the predecessor of Mr Hugh Grant.

In 1782, on the death of the incumbent, different presentees were offered, by the Duke of Gordon, as having right to the sole patronage; and by Mr Hugh Grant as patron of Moy. And the settlement having been delayed till the question of right should be determined in the civil courts, it was at length found by the Court of Session, that the patronage of Moy belonged to Hugh Grant, and that of Dyke to the Crown.

Still, however, the Duke of Gordon, whose ancestors had been in use of presenting in this parish, insisted, that the patron of Moy having exercised his right on the immediately preceding vacancy, the person named by himself should be preferred, or that at least the right of presentation should be held as devolved, for that time, to the presbytery.

Observed on the Bench: The enactment of 1617, c. 3. provides, that, in the union of two or more parishes, ' the presentation of ministers should be appointed by the commissioners of tithes, to pertain to the patrons *alternis vicibus*.' But by this it was not intended to abridge the *rights* of patrons, but merely to regulate the *possession*, in the only way which the nature of the case admitted of. When, therefore, the patron who may present on a particular vacancy does not chuse to exercise his right, that of the other, meeting with no obstruction, must be allowed its fullest influence.

' THE LORDS preferred the presentee of Mr Hugh Grant.'

Lord Ordinary, *Swinton*.
Clerk, *Sinclair*.

Act. *Blair, Ja. Grant*.

Alt. *Maclaurin, Honyman, Tait*.

G.

Fol. Dic. v. 4. p. 49. Fac. Col. No 18. p. 32.

One of the patrons in an united parish, may present on every vacancy, if no presentation be offered by the other patron.

SECT. II.

Vacant Stipend.

No 27.

Patronage found to carry right to vacant stipends, after seven years application to universities by act of Parliament, notwithstanding an act of Council prorogating that act to seven years more.

1681. February 23. SIR ROBERT HEPBURN *against* —.

In a competition for a vacant stipend, between Sir Robert Hepburn, as patron of the kirk of —, and — as having a gift from the Council;—it was *alleged* for the patron, That the stipend in question being due for years after the seven years applied to Universities by act of Parliament, doth belong to the patron, who *de jure communi*, and by our unquestionable consuetude, before the patronages were taken away by the rescinded Parliament 1649, and after the right of patronages were restored by the act of Parliament 1661, the patron had the unquestionable right to the vacant benefice or stipend, except only the seven years applied to Universities by the 20th act of Parliament 1672, which ended *anno* 1678.—It was *answered*, That by an act of Secret Council there is a prorogation of that act for other seven years.—It was *replied* for the patron, That nothing but an act of Parliament could take away, in whole, or in part, the private right of patrons.

THE LORDS preferred the patron.

Stair, v. 2. p. 866.

1694. February 20. DONALDSON *against* BROWN.

No 28.

THE patron's gift of the vacant stipend to the last minister's widow and children found a pious use, in terms of the act of Parliament, provided they dwelt within the parish at the time.

Fel. Dic. v. 2. p. 48. Fountainhall.

*. * This case is No 14. p. 471. *voce* ANNAT.

No 29.

1695. December 6. LORD WILLIAM DOUGLAS *against* HERITORS of Mannour.

In a double pointing about a vacant stipend, where the patron had destined the same for building a bridge in the parish; and on the other hand, the heritors and presbytery had allocated it for repairing the church and manse, it was found, That since the patron was never interpellated by the heritors and presbytery to apply, but that he had made the first application himself, and that to an

uncontroverted pious use within the parish, therefore his destination must be preferred. No 29.

Fol. Dic. v. 2. p. 48. Fountainball.

* * * This case is No 12. p. 8501. *voce* MANSE.

1699. January 17.

CAIRNMONT and MAXWELL *against* The HERITORS of Kirkbane.

I REPORTED Mr John Cairnmont, and Maxwell of Kirkhouse, his cedent, who pursued the Heritors of the parish of Kirkbane, for payment of the vacant stipend of that church, cropt 1698, to him, as patron. And having obtained a decret for the same before the Steward of Kircudbright, they suspended on this reason, that they were also distressed by Adam Craik of Arbigland, who had a gift of the same year's vacant stipend from the Privy Council, on the recommendation of the presbytery of Dumfries, on this narrative, that Kirkhouse, the patron, was a reputed papist, and so by the 23d act of Parliament 1690, had lost the patronage, and the same devolved to the presbytery: And Craik being admitted for his interest, contended, the decret charged on was null; *imo*, Because this active title instructing him to be patron, was not produced; and though it be now given in, yet that should have been done *in initio litis*; and farther, offered to prove he was denuded of the patronage by expired adjudications, and voluntary dispositions; which the LORDS found relevant, being proponed by some of his creditors adjudgers; *2do*, By the foresaid act of Parliament, a patron misapplying the vacant stipend loses both that and the next vice; but so it is, Kirkhouse assigned it to Mr John Cairnmont, which is not in the terms of law, requiring, that they be employed on pious uses within the parish, which this is not. *Answered*, His assignation is but in trust, and his name only borrowed for the patron's behoof, and he is willing to declare his assignation is only of the nature of a factory to uplift it for the patron, that he may apply it to pious uses. THE LORDS remembered they had refused to sustain this to the Earl of Balcarras, and so found the assigning it was a misapplication, by which he lost the management and administration of it for this vacancy; and therefore sustained and preferred Arbigland's gift from the Privy Council; and the declaring now, *ex post facto*, that it was only a trust, is not sufficient to redintegrate and validate the same. Thus there was no necessity of determining the presumptions adduced to prove the patron was commonly holden and reputed a papist, though he came now and then to the protestant church, with his testificates that he renounced all popish principles, and ready to subscribe the Westminster Confession of Faith without any mental reservation, equivocation, or dispensation whatsoever; but being deter-

No 30.

A patron who had assigned the vacant stipend in trust, for his own behoof, was found to have forfeited his right to the administration of the vacant stipend for pious uses, and a donatary of the Privy Council was preferred.

No 30.

mined upon the former grounds, the LORDS did not dip upon this. By the canon law, if a patron fall poor, he is to be alimented out of the benefice which he or his predecessor founded or enriched, on this presumption, that the donation was with that implied quality.

Fol. Dic. v. 2. p. 48. Fountainhall, v. 2. p. 35.

1700. June 20. LORD SALTON against LADY PITSLIGO.

No 31.

The stipend must be applied to pious uses within the parish.

THE Lord Salton, being patron of the kirk of Tyrie, procures an act of Privy Council, allotting 1000 merks of the vacant stipends thereof, for repairing the adjacent harbour of Frazerburgh; and the Lady Pitsligo, both for her own liferent, and as curator to her son, being debtor in 500 merks of it, she makes a discharge of the stipend, and grants bond for that sum to George Cheyne shore-master there; but being afterwards charged on her bond, the Lady suspends, that she was likewise distressed at the instance of the Moderator of the presbytery, who craved the said stipend might be applied to sundry pious uses within the parish, which they concended on, as the repairing the church and manse that were ruinous, the building a bridge, and the maintaining the poor, conform to the destination of the act of Parliament 1685. *Answered*, Whatever might be pleaded if the thing were intire, yet here the nature of the debt was wholly innovate by making a discharge of the stipend and granting a bond for it; so it was extinct as to the nature and quality of a stipend, and on the faith of it that sum, and more, was actually expended on the harbour, which, though not within the parish, was adjacent thereto, and very beneficial to them; so it being *bona fide* employed before quarrelling, *res non est amplius integra*, but the Lady must pay. *Replied*, It was not denied, but the bond was given for the stipend, and so being surrogate *in ejus locum sapit naturam surrogati*, and must be liable to its burdens; and *esto* the sum equivalent had been expended on the harbour, yet *non refert*, seeing the bond is yet unuplifted, and so, as extant, may be affected by the presbytery, and claimed for the pious uses within the parish, which neither the patron nor any act of Privy Council can invert to any other use without the parish, though never so necessary; seeing this were to dispense with the act of Parliament's specifical destination; and the being employed or not does not alter the case; and has been oft so found by the LORDS, as in the competition for the vacant stipend of the kirk of Foveran, betwixt the heritors of the College of Aberdeen, who had the Privy Council's gift; and the like was determined as to the stipend of Falkirk. Some of the LORDS thought this a material specialty here, that, on the faith of this bond, they had expended the sum; but the plurality preferred the presbytery and parish to the harbour, and found it behoved to be applied to pious uses within the parish in the first place.

Fol. Dic. v. 2. p. 48. Fountainhall, v. 2. p. 97.

1715. June 25.

Mr GEORGE OGILVIE, Minister of Kirriemuir, *against* The HERITORS of the said Parish, the EARL of PANMUIR, JOHN LUMSDEN, and Others.

THE church of Kirriemuir, becoming vacant by the decease of the incumbent, in May 1713, the Duke of Douglas presented the said Mr George Ogilvie, then minister of Benvie, to supply that vacancy in July thereafter; and both Benvie and Kirriemuir being within the said presbytery, Mr Ogilvie was transported on the 26th of August, and admitted minister of Kirriemuir the 17th of September.

The Earl of Panmuir and John Lumsden his assignee, claimed right to the patronage of that church, and gifted the vacant stipend to one Mr. Rait an Episcopal minister; and likewise presented Mr Willison minister at Brechin, a church within another presbytery; and there happened some obstruction in the admission of Mr Ogilvie, the church-door being kept shut, notwithstanding the presbytery proceeded to his admission elsewhere.

Mr Ogilvie being thus admitted, has raised a process for delivering to him the keys of the church and manse, and for putting him in possession thereof, and of the glebe, and for payment of his stipend since his admission, and during his incumbency, calling the Heritors of the parish, and the said Mr Rait.

It was *alleged* for the said Earl and his assignee, That the pursuer was not duly admitted, in as far as the Earl has produced a long progress of right to the patronage, by virtue whereof he had offered a presentation to the presbytery within six months after the vacancy happened, and the presbytery, to avoid the effect of the said presentation, had shifted their ordinary diets of meeting, nevertheless the Earl had intimated his presentation to Mr Willison, the person presented, and to the moderator of the presbytery, whose duty it was to have called the presbytery *pro re nata*; yet the presbytery proceeded to transport and admit the pursuer upon a popular call in reality, though possibly they may have taken the cover and shew of the Duke of Douglas's presentation, who had no right to the patronage; which proceeding could not prejudice the Earl of Panmuir's right of patronage, nor to the vacant stipends, ay and while a minister should be duly and lawfully admitted; upon all which the Earl had raised a declarator of his right.

It was *answered* for the pursuer, That he had acted nothing but according to his duty, and in subordination to the presbytery of the bounds where he was and is minister; and conceived also, that the presbytery had proceeded very regularly, for the Duke of Douglas having presented the pursuer to the presbytery in July, he was regularly and orderly transported upon the 26th of August thereafter, before ever there was any intimation or mention of the Earl of Panmuir's claim to the patronage; and, by the act of transportation, his relation was loosed from the parish of Benvie, and his admission thereafter was but

No 32.

A minister having been presented to a church, and the patron's right having been called in question, it was found, that the minister thus presented ought to enjoy the stipend, manse, &c. by virtue of his admission, without prejudice to the right of the competing patrons; but no decision was given as to what might be the effect, if the patron who had presented him should be found to have no right to do so.

No 32.

the execution of the former act; and denies, that he was admitted upon a popular call, but conceives that a minister having a presentation may very lawfully accept of a popular call likewise, to testify the concurring desire of the people in the choice of their minister, which is and ought to be very desirable and comfortable to every minister of the gospel. And as for the presentation by Mr Lumsden after the transportation, *1mo*, It was never presented presbyterially, nor was the moderator required to call a presbytery *pro re nata*. And *2do*, The minister called had altogether refused and declined to accept, which was likewise made known to the presbytery in as far as the instrument of intimation to Mr Willison did bear his refusal; neither was he within the same presbytery, and was placed in a more considerable post; so that the call was not, nor could be expected, to take any other effect, than to give disturbance and create difficulties in planting of the church.

3tio, The Earl having never any possession of the patronage, the presbytery was *in bona fide* to proceed, upon the first presentation, as they did; and being no competent judges of the right of either party, they had no reason to delay the admission till the right of patronage should be determined, which will depend upon the parties claiming right thereto, and may not happen for the course of several years.

4to, The Duke of Douglas, the other party claiming right to the patronage, is not cited; and it does not belong to the pursuer and presbytery to dispute the Duke's right; nor can they do it, knowing nothing of the right or possession of either party. Nor does the pursuer his process or possession determine or prejudice, or carry any benefit to the right of patronage, either to the one or the other; but what he pleads is, that he is admitted by the presbytery of the bounds to whom the right of admission of ministers to vacant churches does belong, and that the presbytery acted *bona fide*, at least upon probable reasons, and consequently that the pursuer ought to be possessed of the church, manse, and glebe, and enjoy the stipend in the interim without prejudice to the right of either party, reserving to them to prosecute and declare the same as accords.

"THE LORDS found, That the pursuer ought to be possessed of the church, manse, and glebe, and enjoy the stipend, by virtue of his admission during his incumbency, without prejudice to the right of either party, after the same shall be established and cleared by decreets; and the LORDS did not judge what might be the effect in case the Earl of Panmuir's right might be found to be preferable in the event; whether the pursuer's right to the benefice should cease from that time, or if the Earl's right should only take effect after the pursuer's decease or transportation.

Dalrymple, No 148. p. 203.

1745. *February 27.*The RELICT and CHILDREN of ROWAN *against* NEILSON and Others.

By act 1690, when the patron is Popish, he is to apply the vacant stipend to pious uses within the parish, at the sight of the presbytery. Application having been made by the relict and children of Mr Rowan, the last incumbent of the parish of Parton, to Glendinning of Parton, the patron, who was Popish, he recommended to the presbytery to make out a gift of a year's vacant stipend in their favour; which the presbytery having accordingly granted, and the donees having thereupon obtained general letters of horning, and charged Neilson of Corsack and the other heritors; they suspended upon two grounds, 1st, That the exception in the act 1690 discharging general letters in favour of ministers on their decrees of locality for their stipends, is personal to the ministers themselves, and by no means inherent in the stipend, to be communicated to every person who obtains a right to vacant stipend; 2^{dly}, That the use for which this grant was made, was not a pious use in the sense of law: That what is to be considered as a pious use, is to be gathered from the 18th act, Parl. 1685, wherein all the particulars are mentioned, viz. building bridges, repairing the church, maintaining the poor, to which the heritors are obliged to contribute out of their own funds, where there is no common fund to be so applied; it being thought reasonable that the heritors, who have the burden of the minister's stipend during the incumbency, should be eased during a vacancy, by having the stipend applied for the public uses of the parish; whereas in this case, the relict and children of Mr Rowan had a free fund among them of at least 6000 merks, and therefore could not be reckoned to fall under the description of the poor mentioned in the statute; and that even some of the children had not their residence within the parish, and the law is limited to pious uses within the parish.

A bill against the interlocutor of an Ordinary repelling these reasons of suspension was refused without answers.

Fol. Dic. v. 4. p. 52. Kilkerran, (PATRON.) No 1. p. 373.

1751. *June 26.* COCHRAN of Culross *against* STODDART.

THE charge of second minister of Culross becoming vacant by decease in November 1746, Mr Charles Cochran of Culross presented thereto Mr William Trotter, probationer, who accepted; and the presentation and acceptance were notified to the moderator of the presbytery, 4th May 1747, and produced to the presbytery 3^d June; and 1st July there was produced to them a charter of the patronage of the kirk of Culross, which had formerly belonged to Mr John Erskine of Carnock, dated 12th February 1747.

No 33.

The patron's powers with respect to vacant stipends.

No 34.

A patron found to have right to the fruits of a benefice, where a minister had been settled, though there was a suit depending concerning the right of patronage.

No 34.

Neither Mr Cochran's author nor his predecessors had presented either first or second ministers; but Colonel Erskine, the disponent's father, had, as patron, disposed of the vacant stipends.

Objection was made before the presbytery to Mr Cochran's title, by the heritors, magistrates, and town-council, and by the kirk-session; 1st, That the patronage which belonged to the abbey was granted to the Lord Colvil, and he did not shew any progress from him, or that he was denuded; but none of the objectors pretended any title.

2^{dly}, That the charge of second minister was founded in 1648, in consequence of an agreement, and upon a voluntary contribution by the parishioners: That the patronage thereof was reserved, and vested in delegates to be chosen by the contributors; and that it appeared by the records of the session and presbytery, the first incumbent was so presented.

For these reasons the objectors alleged there was no presentation; and craved of the presbytery to moderate a call, as their custom was on the *jus devolutum*, which they granted, and 16th September 1747, approved of the call given 26th August 1747 to Mr Thomas Fairny. Mr Cochran appealed to the synod of Fife, who, 3th September, affirmed the sentence, as did the General Assembly, 20th May 1748.

Mr Fairny declining the charge, a new call was given, 6th October, to Mr James Stoddart, which the presbytery approved, and settled him minister, 24th November; notwithstanding Mr Cochran insisted on his presentation already granted, which they rejected, as the case had been determined by the General Assembly.

The settlement was made during the pendency of an appeal, either from the presbytery to the synod, or from them to the General Assembly 1749: But this appeal the committee of bills of the Assembly refused to transmit to the House; and the commission of the Assembly, to whom a complaint against the committee was referred, approved their conduct.

After the call to Mr Fairny was approved by the presbytery and synod, Mr Cochran had insisted in a declarator before the Court of Session, of his right to the patronage of this church, calling the Officers of State, and the heritors, and the town-council of Culross; but, there being a defect in the summoning the town-council, process was sisted by interlocutor 21st January 1748, till they should be called; and this being done, diligence was granted to the defenders 23d July 1748, for recovering the original contract, said to have established the fund for supporting the second minister: The contract, however, was not recovered; and Mr Cochran having referred to a charter on record 1633, of the patronage to the Earl of Kincardine, from whom Colonel Erskine derived right, the Lords, 21st January 1749, preferred him to the Crown in the presentation of the first minister, and of consequence found he had right to the presentation of the second minister; and found the defenders had not brought sufficient evidence, that the contributors had reserved to themselves the right of presenting

him: The condescence of the old charter was not made in order of time, till after Mr Stoddart's settlement.

Mr Cochran pursued the Heritors for their stipends, as having timeously presented; and a multiplepoinding was raised in their name, calling him and Mr Stoddart the minister.

Pleaded for the minister, he has right to the stipend being duly settled by the presbytery, who were not obliged to keep the church vacant till the pursuer made out his title to the right of patronage: He did not make it appear to them he had a right to the patronage of the first charge, producing only a recent charter without a progress; they had probable evidence by their records of the patronage of the second charge being reserved; in these circumstances they proceeded, as in the case of a dubious right of patronage; and their procedure was approved by the synod and subsequent General Assembly, Mr Cochran in the meantime insisted in a declarator before the civil court, to which the presbytery were not made parties; he was opposed by the King's Council, in behalf of the Crown, and only obtained his declarator after two years, and when Mr Stoddart was settled; the presentation not being sustained by the General Assembly, when objected to Mr Fairny's call, this was a *res judicata* to the presbytery, and they could not again take it into consideration, when objected to Mr Stoddart's.

2dly, The act 117th, Parl. 1592, whereby the patron has right to the benefice, if the church is settled without regard to his presentation, appoints him to present a qualified minister, which Mr Trotter was not.

Pleaded for the pursuer, There was no dubiety of his right; he produced a charter, and his author had possessed by disposing of the fruits of the vacant benefice. No other title appeared; and the heritors, after the alleged lapse, only craved the presbytery would proceed *jure devoluto*, in regard he had no right to the patronage of the second charge, it being reserved; but of this the presbytery record was not evidence. The presbytery affected to doubt of his right to the patronage of the church, and obliged him to raise a declarator; this is in their power to do in all cases. They did not act *bona fide*, having proceeded to settle Mr Stoddart, pending his appeal, contrary to their own rules; and if the matter had been delayed till the General Assembly, the declarator would have been obtained.

THE LORDS preferred the patron.

Reporter, Justice-Clerk. Act. Lockhart. Alt. R. Craigie. Clerk, Kirkpatrick.

Fal. Dic. v. 4. p. 52. D. Falconer, No 213. p. 256.

1752. July 29.

Mr ROBERT DICK *against* Mr JAMES CARMICHAEL, Factor appointed by the Barons of Exchequer.

No 35.

A minister admitted upon a presentation from the patron last in possession, found entitled to the stipend during his incumbency, tho' another was afterwards found to have a preferable right to the patronage. Reversed upon appeal.

IN the 1647, Colonel Lockhart of Lee, obtained a charter under the Great Seal, granting *de novo* the estate of Lee; and also containing an original grant of the patronages of the two parishes of Lanerk and Carluke; and these patronages were contained in all the subsequent title-deeds. From this period the Crown never laid claim to any of the two patronages; the family of Lee possessed both; had presented to the parish of Carluke; and though there had been no opportunity of presenting to the parish of Lanerk, yet the vacant stipend of that parish had been disposed of by the family of Lee.

A vacance happening in this parish *anno* 1748, John Lockhart of Lee presented Mr Robert Dick, who being disagreeable to the Magistrates of Lanerk, a presentation was obtained from the Crown in favours of another, which made it necessary for Mr Lockhart to bring a declarator of his right against the Crown. The objection against his title was, That the charter 1647 being granted by the Barons of Exchequer, without a special warrant from his Majesty, was null *quoad* the two patronages, to which the family of Lee had no anterior right. And accordingly, it was at last found by the Court of Session, That the pursuer Lockhart of Lee had no right to the patronage of Lanerk, No 14. p. 9913.

But as this process was spun out for a considerable time, the church-courts did not think it their duty to wait the issue of the process in the Court of Session. They proceeded in the regular manner to settle Mr Dick, who was presented by the patron in possession, and who at the time appeared also to have the best right.

The Barons of Exchequer, after the process was determined in the Court of Session against Mr Lockhart of Lee, judging the settlement of Mr Dick to be also void, granted a factory to uplift the stipend as vacant. The factor brought a process before the Court of Session against the Heritors, who insisted in a multiple-poining, calling the Crown and Mr Dick the present incumbent.

In behalf of the Crown, the act 117, Parl. 1592, was *urged*, "Providing, that, in case the presbytery refuses to admit a qualified minister presented to them by the patron, it shall be lawful to the patron to retain the hail fruits of the benefice in his own hands." And it was subsumed, that the church-courts having refused to admit the King's presentee, the King as patron is entitled in terms of the statute to the fruits of the benefice.

Answered for Mr Dick; There is a wide difference betwixt the case of a single presentee and that of competing presentees. In the former case, the presbytery cannot overlook a presentation, and settle a church by a popular call, which would be a gross contempt of the laws of the land. Such a settlement is declared null by the act 1592, and justly. This was the case of the

late settlement of the parish of Culross, (*supra*) to which this Court did apply the said act 1592, finding that Mr Cochran of Ochiltree, the undoubted patron, whose presentee was rejected by the church-courts, was entitled to retain the vacant stipends. But in the case of competing presentees, these courts, who are bound to settle the parish, must judge the best way they can in the competition; and though they should err in point of judgment, such error may be redressed *rebus integris*, but cannot have effect to annul a settlement regularly made. To this case the act 1592 is not applicable.

It was *answered, 2do*, That there is a rule laid down in all Christian countries, and in Scotland in particular, with regard to the case of competing patronages, viz. That the presentee of the patron in possession is to be preferred, till the true patron get his right declared in a proper court. Therefore, as Lockhart of Lee was unquestionably in possession of the patronage, the ecclesiastical courts did nothing but what was incumbent upon them by the law of the land when they preferred Mr Dick:

THE LORDS preferred Mr Dick.

This question being appealed in behalf of the Crown, the decree was reversed, and his Majesty was preferred to the stipend,

Fol. Dic. v. 4. p. 52. Sel. Dec. No 20. p. 22.

. This case is reported in the Faculty Collection :

1753. *March 2.*—THE parish of Lanerk having become vacant in the month of August 1748, Mr Lockhart of Lee, as standing infeft in the patronage, under a charter from the Crown, *anno* 1647, presented Mr Robert Dick to the vacant parish; and which presentation was duly accepted and given into the presbytery in the month of October 1748.

Some time after, and within the six months, another presentation was given into the presbytery by the Crown, as patron of the said parish, in favours of Mr James Gray. The presbytery for some time delayed giving their judgment; and at last, upon the 11th April 1750, they preferred Mr Lockhart's presentee, and appointed a moderation of a call in his favours; and which call they afterwards sustained.

The Magistrates of Lanerk having appealed to the General Assembly, which met in the month of May 1750, the Assembly affirmed the sentence of the presbytery, and appointed them to proceed to the settlement of Mr Dick.

In obedience to this judgment, the presbytery proceeded to the trial of the said presentee; but being interrupted in their procedure by a mob in the town of Lanerk, the matter was referred to the Synod; who appointed Mr Dick to be ordained at Glasgow. This was accordingly done upon the 4th October 1750; and, in consequence thereof, Mr Dick obtained possession of the church, and has served the cure as minister of the parish ever since,

No 35.

During these proceedings before the ecclesiastic courts, Mr Lockhart, in the month of March 1750, raised a declarator of his right of patronage before the Lords of Session; and, upon the 10th June 1751, the Court adjudged, "That Mr Lockhart had produced no sufficient title to the patronage in question; and that, for ought yet seen, the said patronage remains with the Crown; and decerned and declared accordingly."

Soon after this judgment, the Barons of Exchequer granted a factory to Mr James Carmichael, for his Majesty's behoof, to uplift the vacant stipend of this parish; and a multiple-poiniding having been brought in name of the heritors, a competition ensued between the King's factor and Mr Dick the minister, for the stipends which had fallen due since the time of Mr Dick's admission.

Pleaded for the factor; That by the act 116th, Parl. 1592, "it is ordained, that all presentations to benefices be directed to the particular presbyteries in all time coming, with full power to them to give collation thereupon, providing the foresaid presbyteries be bound and astricted to receive and admit whatsoever qualified minister, presented by his Majesty or laick patrons." And by the immediate following act of the same Parliament, it is further provided, "That, in case the presbytery refuses to admit any qualified minister presented to them by the patron, it shall be lawful to the patron to retain the whole fruits of the said benefice in his own hands."

These statutes, though suspended during the subsistence of the act 1690, which abolished the right of presentation, again revived when patronages were restored; and are admitted, since that time, to be part of the law of Scotland.

- Without some such constitution, the right of presenting would be inept. The compulsitors of the law, which formerly took place for enforcing presentations, were not thought so well accommodated to the genius of presbytery; and therefore a more gentle remedy was devised by these statutes, viz. That the benefice should remain with the patron as vacant, till the presbytery admit his presentee; and which indeed is saying no more than what is implied in the nature of his right and *inerat de jure*, without such express provision. And accordingly, this Court has applied this remedy of the law in two former instances; in the case of the patron of Auchtermuchty, anno 1735, (*See APPENDIX*); and lately, in that of Charles Cochran of Culross against Stoddart, anno 1751, No 34. p. 9951.

And as the King, by the judgment of this Court above recited, has been found to be lawful patron of this parish; and in due time, after the death of the last incumbent, presented to the presbytery Mr James Gray, a well-qualified person, to supply the vacancy; and that the presbytery have, to this day, *refused* or deferred to admit the said presentee; therefore, in terms of the statutes above quoted, his Majesty is entitled to *retain* the whole fruits of the benefice in his own hands, until his presentee shall be admitted; and the factor appointed by the Barons of Exchequer for receiving such fruits, ought to be preferred thereto accordingly.

Answered for Mr Dick ; The sanction of the act 1592 can only apply to the patron in possession of the vacant benefice, at the time when he presents to the presbytery ; for a possession of the benefice cannot be *retained* till it is *attained*. Mr Lockhart and his predecessors have stood in feist in this patronage since the 1647 ; it is not pretended that the Crown has exercised one act of possession since that time ; and it is proved, that, upon occasion of the last vacancy of the parish, in the year 1708, Mr Lockhart's predecessor disposed of the vacant stipend, as patron ; so that Mr Lockhart must be considered as the patron in possession. If Mr Lockhart's presentee had been rejected by the presbytery, it was indeed possible for him to have *retained* the vacant stipend of which he had the last possession ; but it impossible for the King to have the benefit of the sanction of this law, by *retaining* what he never possessed.

2do, Et separatim, Every person, in possession of any subject or right, by virtue of a habile title, is entitled to retain and enjoy that possession till such time as he is legally dispossessed by the true proprietor. The right of presenting is a proper fruit of patronage ; and consequently, a party in possession of a patronage, in virtue of a habile title, is entitled to present ; and his presentation will be effectual, although, before collation, his right be brought under challenge ; Lambertinus de jure patronatus, lib. 2, part. 1. quest. 3. art. 4. Jacob's law dict. Darreign presentment. Reg. mag. lib. 3. cap. 33. From these principles it follows, that Mr Lockhart's presentation having been granted before any challenge against his right, was a good presentation ; and, having had effect by the ordination of the presentee, cannot be rendered invalid by the after decret of the civil court setting aside his right.

3tio, The sanction of the statutes above quoted, cannot apply to the present case ; because the presbytery complied with the direction of the law ; and admitted the presentee of the only legal patron, so far as could appear to them. The law indeed requires, that the presbytery should admit the person presented by the patron ; but, as it has given the presbytery no remedy, whereby they can bring the rights of competing patrons to trial in the civil court ; it must therefore be implied, in the jurisdiction given them by law of admitting the presentee of the lawful patron, that they must have a power of trying the rights of competing patrons, to the effect of explicating that jurisdiction. And this judgment of the presbytery, upon the point of civil right, must determine the settlement of the church, and put an end to the vacancy ; and consequently, to any claim for the benefice as vacant, *pro hac vice*. It will not indeed preclude the party aggrieved from having his right afterwards tried in the civil court ; but it must determine the right to the effect of supplying the present vacancy ; and, if it were otherwise, this absurdity would follow, that though the law has required the presbytery to settle vacant churches, upon the presentation of the lawful patrons ; yet the presbytery cannot comply with the law, wherever a competition happens about the patronage. Neither the presbytery nor the civil judges can force the parties to a decision of their rights ;

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and so, by this means, vacancies may be continued for ever. And as to the cases of Auchtermuchty and Culross, they are, in many respects, different from the present; and consequently the decisions therein given will not apply.

In the reply for the factor, it was *observed*, That Mr Lockhart never had been in the proper possession of this patronage. The King himself had presented the last time it could be done, in the 1643; and the pretence of Mr Lockhart's possession in 1708 is frivolous; for it appears that Lockhart of Carnwath and the town of Lanerk took upon them also to grant assignations of the vacant stipend of that year, under the assumed character of patrons; and such private grants, without the knowledge of the King's Officers, could not be sufficient to dispossess his Majesty of this patronage.

"THE LORDS preferred Mr Robert Dick, the incumbent, to the stipend that hath fallen due, since his admission to be minister of the parish of Lanerk, and in time coming, during his incumbency; and decerned accordingly."

Act. *Advocatus & Pringle.*

Alt. *Dick, Brown, & Pringle.*

Clerk, *Kirkpatrick.*

Mc

Fac. Col. No 70. p. 106.

* * * This case was appealed :

The House of Lords "ORDERED, That the interlocutor of 2d March 1753 be reversed."

1754. *March 8.*

HERITORS of the PARISH of TAIN, *against* MARGARET MONRO.

No 36.

When the King becomes patron of a church in consequence of the attainder of the former patron, he is not bound to apply the vacant stipend for pious uses within the parish.

THE patronage of the church of Tain fell to the Crown by the attainder of the Earl of Cromarty. The Barons of Exchequer, in right of his Majesty, granted certain vacant stipends of this parish to Margaret Monro widow of the last incumbent.

Some of the heritors having been charged by her for payment of these stipends, presented a bill of suspension, and *pleaded*, That the gift to the charger is an illegal application of the vacant stipends, which, by law, are appropriated for "pious uses within the parish." The act 18th, Parl. 1685, indeed declares, that this "is not to be extended to the vacancies of those churches whereof the King's Majesty is patron;" but this exception relates to patronages then acquired, not to such as might afterwards be acquired by the Crown. In this case, the King has, since the act 1685, come in right of the Earl of Cromarty; and every objection which would have been good against a gift obtained from the former patron, must be good against a gift obtained from the King.

Answered for the charger; The patron had formerly, by common law, the disposal of the vacant stipends. The act 18th Parl. 1685, ordained the vacant

stipends to be applied for pious uses within the parish ; but there is an exception in cases where the King is patron ; that is, the King was to remain in the condition wherein all patrons were before that act, and have the incontrollable disposal of vacant stipends : This is a personal privilege in favour of the King, and must therefore be extended to patronages acquired since the act 1685, as well as to those which were in the Crown at that time.

“ THE LORDS refused the bill of suspension.”

For the Suspenders, *Lockhart.*

Alt. *Sir David Dalrymple.*

D.

Fol. Dic. v. 4. p. 52. Fac. Col. No 106. p. 158.

No 36.

1778. July 12.

LEITH of Whitehaugh *against* Earl of FIFE.

No 37.

AN heritor charged by a patron for vacant stipend, is not allowed to retain or suspend payment, on the allegation that the patron has forfeited his right of administration by his misapplication of former vacant stipends : He must pay in the first place, the law having provided sufficient remedy against the patron's malversation. See APPENDIX.

Fol. Dic. v. 4. p. 52.

SECT. III.

Jus Devolutum.

1682. November.

APPLEGIRTH *against* THOMSON.

No 38.

The Lords sustained a presentation granted by a bishop as having right to present *jure devoluto*, in respect the patron did not present a qualified person within the six months, the time allowed by the act of Parliament, in which the patron is to perfect all his presentations.

THE Archbishop of Glasgow having admitted Mr Thomas Thomson to the church of Applegirth *jure devoluto*, Mr Alexander Jardine of Applegirth patron of the old church, pursued a reduction against the said Archbishop and Mr Thomas, of his admission, upon the ground that the admission granted by the Archbishop was null, seeing the right of presentation did not belong to him *jure devoluto*, in respect Applegirth, who was patron, did present a person to the church within six months after it was vacant conform to the 7th act Parliament 1. James VI. which was sufficient to save his right of patronage, and it was the Bishop's fault that the person he presented was not admitted, seeing he refused to collate him. *Answered*, That it is provided by the act of Parliament, that the patron should present a qualified person within six months after he have knowledge of the vacancy ; but so it is, that the person presented by

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the pursuer, was not sufficiently qualified, the Bishop, after his presentation, having remitted his trial to the presbytery, it was found he was given to drink and found unfit for the ministry, so that the pursuer not having presented another qualified person within the six months, the Bishop had right to present *jure devoluto*. *Replied*, That the pursuer was *in bona fide* to think that the person presented by him was qualified, seeing he was licenced to preach by the same Archbishop, and the pursuer was not obliged to present another within the six months, unless it had been intimated to him that the person presented was not sufficiently qualified; and if it were otherwise, laick patrons might be easily prejudged of their right of presentation, if the Bishop did not intimate to him that the party presented was rejected as not sufficient, to the effect he might present another. *Duplied*, That the Bishop was not obliged to make any intimation that the party presented was not qualified; but it is sufficient to give the Bishop the right of presentation *jure devoluto*, that the patron did not present a qualified person within the six months conform to the act of Parliament; and if it were otherwise, it would be in the patron's power always to keep the church vacant, for he might always present insufficient persons, and as one were refused he might present another, which if it should run other six months, and so from six months to six months, the church, by that means, should never be supplied; and therefore the patron ought to present timeously, that if the person presented should be rejected as insufficient, he might present another qualified person before the six months expire. THE LORDS sustained the presentation granted by the Bishop, as having right to present *jure devoluto*, in regard the pursuer did not present a qualified person within the six months, which the LORDS found was the time allowed by the act of Parliament, in which the patron is to perfect all his presentations; so that if the person presented by him within the six months be not qualified, the right of presentation for that time belongs to the Bishop *jure devoluto*.

Fol. Dic. v. 2. p. 47. Sir Pat. Home, MS. v. 1. No 268.

* * * Harcarse mentions this case :

1682. *December*.—A PATRON having presented within six months a minister, who was habite and-repute sufficient for literature, but who, after six months, was refused by the Bishop, upon information of some scandal, whereof the patron was ignorant; he, the patron, upon the Bishop's refusal, claimed the privilege to present another after the six months.

Alleged for the Bishop; That the patron's power of presenting was confined to six months, after which there was a *jus devolutum*. And the act 7th, Parl. 1. James VI. which states the case of patrons presenting twice, confines both to six months.

Answered for the patron; By the act of Parliament, the Bishop has the *jus devolutum*, if the patron neglect to present within the six months; but so

it is, the patron here did present *debito tempore*, and could not present another, untill the Bishop had rejected the former; so that what part of the six months was lost by the Bishop's delay, cannot be imputed to the prejudice of the patron.

THE LORDS ordained the point to be debated *in præsentia*.

Harcarse, (PATRONAGE.) No 649. p. 211.

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1696. December 8.

PRESBYTERY of FALKIRK *against* The Earl of CALLANDER and His TUTORS.

PHILIPHAUGH reported the Presbytery of Falkirk against the Earl of Callander and his Tutors, for declaring that he had lost the vice of presentation of the minister of Falkirk, (whereof he was patron,) both during this vacancy and the next, because he had neither qualified himself, nor applied it to a pious use within the parish. *Alleged*, That being the delinquency of the last Earl, it cannot prejudice his heir; because in *pænalibus non datur actio in hæredem ex defuncti delicto*. *Answered*, The certification against misapplication of the stipend is not such a penalty as is intransmissible to the heir, but is rather *jus accrescendi* to the moderator of the presbytery, and a devolution; and if the last Earl had no right, he could not give his heir the same, and the tinsel was declared against the last Earl of Callander in his own time. THE LORDS declared against the heir in favour of the presbytery.

Fol. Dic. v. 2. p. 47. Fountainball, v. 1. p. 740.

No 39.

1762. March 2.

THE PROCURATOR for the Church of Scotland, and the MODERATOR for the Presbytery of Ayr *against* THOMAS EARL of DUNDONALD.

THE patronages of the parishes of Monkland and Prestick, within the bounds of the presbytery of Air, belonged of old to the abbacy of Paisley, and were purchased by the family of Dundonald from the Lord of erection of that abbacy.

These two parishes were afterwards united.

In 1662, the then Lord Cochran conveyed the patronage of Monkland to Blair of Adaintoun, in whose family it still remains.

In 1726, Thomas then Earl of Dundonald made a strict entail of his estate, including the patronage of Prestick; but this, notwithstanding, William the immediate predecessor of the present Earl, conveyed the patronage, for favour and affection, to Charles Dalrymple of Orangefield.

Mr William Walker, the last incumbent in these united parishes, having

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A patron having given a presentation, the person presented signified his acceptance by letter, but when he came to be settled, he declared his renunciation of the presentation, as he had since his acceptance got another. The

No 40. patron in course of post, gave a new presentation, but which happened to be without the six months from the vacancy being declared. The presbytery claimed the *jure devolutum*. The Lords found, that by the first accepted presentation, the prescription was interrupted, and that the right of presentation had not fallen *jure devoluto* to the presbytery.

been presented by Blair of Adaintoun, the right of presentation for the next *vice* belonged to the patron of Prestick.

In March 1760, a call was given by the consistory of the Scotch church at Rotterdam to the said Mr William Walker; and, upon the 26th of the month, this call was presented to the presbytery of Air.

Mr Walker declared his resolution to embrace the call, but that it would be inconvenient for him to leave this country before the middle of June; upon which the presbytery agreed to delay finishing the affair, by a formal sentence, till the last Wednesday of May.

The presbytery accordingly met upon Wednesday the 28th of May 1760, and pronounced an act, loosing Mr Walker's pastoral relation with the parish of Monkland, and translating him to the Scotch congregation at Rotterdam, 'leaving it to the consistory of Rotterdam to admit him to be minister there, 'on or before the 1st of August then next.' They did not however declare the vacancy otherwise than by appointing two of their number to preach until a new pastor should be appointed.

Upon the 13th of July 1760, Mr Walker was admitted minister at Rotterdam; and, upon the 4th of November thereafter, the Earl of Dundonald granted a presentation in favour of Mr Alexander Cunningham probationer; which, with the presentee's letter of acceptance, was left, under form of instrument, at the house of the moderator of the presbytery, upon the 25th of the same month.

Mr Dalrymple of Orangefield, who pretended right to the patronage of Prestick, in virtue of the disposition from the late Earl of Dundonald, granted another presentation to Mr George Laurie probationer; and this presentation, with Mr Laurie's acceptance, was lodged with the moderator upon the 19th of the said month of November.

Upon the 27th of January 1761, the presbytery appointed both presentees to preach in the parish.

In the mean time, the Earl of Dundonald insisted in a process for setting aside the disposition by his predecessor to Mr Dalrymple, as a gratuitous deed, contrary to the prohibitions of the entail under which the granter held the esate; and, upon the 31st of January 1761, he obtained a decret of reduction, by which his right to the patronage of Prestick, and his title to present *pro hac vice*, were incontestably established.

At the next meeting of the presbytery, held upon the 18th of March 1761, the Earl's procurator produced an extract of this decret of reduction, and required them to sustain the presentation to Mr Cunningham, and to take the necessary steps for his settlement. Mr Cunningham was then called upon to give his reason why he had not preached in the parish as appointed, when he declared, that the Earl of Eglinton having authorised Mr Montgomery or Lainslaw, his commissioner, to give him a presentation to the parish of Symington,

he had resolved to accept of the same, and to renounce any claim or benefit from the presentation to Monkton. No 40.

Immediately after this verbal renunciation, Lainshaw's presentation of Mr Cunningham to Symington, and the presentee's acceptance thereof, were laid before the presbytery, who, after considering the same, together with a petition from many of the heritors, elders, and heads of families of that parish, desiring them to proceed to the settlement, 'accepted Mr Cunningham's reasons for 'not supplying Monkton according to the presbytery's appointment, as likewise his renunciation, and appointed him to preach at Symington.'

The Earl of Dundonald's procurator being then asked, If he still persisted in his requisition with regard to Mr Cunningham's settlement in Monkton? The presbytery, upon his answering in the affirmative, came to the following resolution: 'In regard they have accepted of Mr Cunningham's judicial renunciation of any claim or benefit accruing to him from the Earl of Dundonald's presentation; also, in regard Mr Cunningham's letter of acceptance of Lord Eglington's presentation to the parish of Symington lies before them, they agree not to take any steps in his settlement at Monkton: And, with regard to Orange-field's presentation, the presbytery are of opinion, that it is now off the field.'

The Earl of Dundonald's procurator immediately protested, 'That the presbytery's accepting of Mr Cunningham's renunciation should not prejudice the Earl's right of patronage to present another qualified person in due time from that date, according to law; and that the presbytery should take no steps with respect to settling any other in the said united parishes.' And, upon the 23d of the same month of March 1761, the Earl granted a new presentation to Mr John Cunningham minister at Dalmellington, which, together with his letter of acceptance, was lodged in the hands of the moderator upon the 27th.

At the next meeting, held upon the 22d April 1761, the presbytery agreed to reject the Earl of Dundonald's presentation in favour of Mr John Cunningham; because, from their minutes, it appeared to them, that the six months allowed by law to patrons for presenting to vacant parishes were elapsed before the giving in of the said presentation; and, for the same reason, found, that the right of settlement was fallen into their own hands, *tanquam jure devoluto*.

The Earl of Dundonald having appealed to the General Assembly, they resolved to delay the consideration of the case till the point of law should be determined in the civil court, and, with that view, directed the procurator of the church to concur with the moderator of the presbytery in raising a process of declarator for having it found, that the right of presentation, *pro hac vice*, had fallen to the presbytery, *jure devoluto*.

A process of declarator being accordingly brought, it was *pleaded* for the pursuers, That from the 28th of May, when the presbytery loosed Mr Walker's pastoral relation to the parish of Monkton, and translated him to the Scotch congregation at Rotterdam, to the 27th of March 1761, when the Earl of Dundonald's second presentation in favour of Mr John Cunningham was lodged

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with the moderator, more than six months had run ; and that, even supposing the presentation and letter of acceptance of Mr Alexander Cunningham, left at the moderator's house upon the 25th November 1760, to be an interruption, and that the same continued till the 18th of March 1761, when the presentee accepted of a presentation to Symington, and renounced that of Monkton ; yet, as there remained only three days of the six months unexpired upon the said 25th of November, so, from the 18th of March 1761, when the first presentation was renounced, to the 27th of that month, when the second was lodged with the moderator, nine days had run ; from which it was clear, that the last presentation came, at any rate, six days after the expiry of the six months allowed by law.

Answered for the Earl of Dundonald ; *imo*, A patron's granting a presentation to a qualified person, which is accepted by the presentee, and is regularly laid before the presbytery within six months of the vacancy, but is afterwards rendered ineffectual by the presentee's renunciation, imports a legal interruption of the currency of the six months, so as to make that time commence *de novo* from the presbytery's acceptance of the renunciation. The right of patronage is a civil right, or right of property, and, if a patron were not, from regard to public utility, laid under certain limitations, he could not be precluded from the exercise of his right of presentation by any lapse of time, less than would be sufficient to cut down the right of patronage itself. Now, although the right of presentation be confined to six months from the vacancy, yet, as that limitation is evidently a penal restraint, it ought to be explained in the manner most favourable to the patron. When he presents a qualified person, who dies or renounces before the necessary forms are dispatched and the settlement compleated, he does all that is incumbent upon him to supply the vacancy ; the benefice, *quoad* his right, is thereby as effectually filled while the settlement depends before the church-courts, as if the presentee were actually settled : He cannot revoke his presentation or grant a new one till it is out of the field ; he has no controul upon the presentee, nor upon the presbytery ; his right, therefore, cannot in equity be hurt by the act or deed of either. Hence, it is equally consistent with reason and justice, that six months should be allowed to him from the death or renunciation of the presentee, as from the death or removal of an incumbent fully vested in the benefice.

This construction, so agreeable to reason, is confirmed by the opinion of the greatest lawyers. Lord Stair says expressly, lib. 2. tit. 8. § 35. That, if the presentee be rejected, ' the patron must present another, which must be done within six months after the vacancy may come to his knowledge, (but the six months may not run from the vacancy, but from the refusal or appeal discussed, which cannot be determined in six months,) otherwise the kirk may admit a qualified person for that time.' And surely, the same reason holds for giving the patron as much time from the acceptance of the presentee's renunciation, without his consent, as from the rejection of a qualified person.

The declared opinion of the legislature likewise supports this doctrine. By the statute of the 5th of George I. cap. 29. § 8. it is provided, 'That, if any patron shall present any person to a vacant church, who shall not be qualified, &c, or who is then, or shall be, pastor or minister of any other church or parish, or any person who shall not accept or declare his willingness to accept of the presentation, such presentation shall not be accounted any interruption of the course of time allowed to the patron for presenting, but the *jus devolutum* shall take place, as if no such presentation had been offered.' When the statute thus declares, that the presenting an unqualified person, or one who does not accept, shall not be accounted an interruption, it admits, *e contrario*, that the presenting a qualified person, who does not accept, shall be an interruption of the six months, as clearly as if it had so expressly declared. The only question then is, What is the legal effect of an interruption of the time prescribed for excluding a civil right? Now, it is established by the opinions of all lawyers, and by a tract of uniform decisions, that an interruption of any kind of prescription makes the course of time to begin to run *de novo*, from the period of such interruption. An interruption made by a process has unquestionably that effect: On the other hand, any particular circumstance that is only suspensive of the currency of prescription, is not, in the language of the law-books or acts of Parliament, said to interrupt it. Thus, in the act 1617, minority is not stated as an interruption of the prescription thereby established; but it is declared, 'that, in the course of that prescription, the years of minority shall not be counted.' Again, in the statute of 19th of Geo. II. cap. 7. it is said, 'that the time and space betwixt the 16th of September 1745, and the 1st of June 1746, shall not be reckoned in any short prescription, but shall be deducted from the same.' Hence, it is evident, that the legal meaning of an interruption is very different from that of a suspension of the cause. It therefore clearly follows, from the words of the above statute of Geo. I. that the presentation and acceptance of a qualified person form an interruption of the six months, so as to make them to begin to run *de novo*.

2do, Supposing the first presentation not to interrupt, but only to suspend the currency of the six months during its dependence, the vacancy was not completed till the translation took effect by the former incumbent's admission to his new charge. The six months could therefore only begin to run from the 13th of July, instead of the 28th of May 1760; in which view, after deducting the space of time that intervened betwixt the 25th of November 1760, when the first presentation was left at the moderator's house, and the 18th of March 1761, when the presentee's renunciation was accepted by the presbytery, it will be found, that the second presentation was lodged near six weeks sooner than was necessary.

Upon this point the patron is intitled to maintain, That the presbytery's act of translation of the 28th of May 1760 was altogether irregular, as proceeding without a previous citation to the parish of Monkton to answer the reasons of

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transportation ; and therefore could not hurt his right. But, laying that circumstance out of the question, the translation and vacancy could by no means be thereby completed. An act of transportation enables the incumbent to be admitted to another charge ; but it is his actual admission only that completes the transportation, and makes the commencement of the vacancy.

3tio, At any rate, the patron's right could not be hurt by any act either of the presentee or presbytery, of which he was ignorant. As much time must therefore be allowed to him over the six months as was necessary for his getting information of a vacancy happening through such act, and granting a second presentation. It is an established rule, That *non valens agere*, is a good exception to the currency of any prescription or lapse of time whereby a right is cut off ; and it would certainly be unjust to forfeit a patron of his right for not exercising it, while the opportunity of doing it is unknown. Now, as the act of the presbytery translating Mr Walker, which passed upon the 28th of May 1760, could not be known at Edinburgh by the common course of post till the 31st of that month, the six months could not from thence elapse till the 1st of December ; so that, upon the 25th of November, when the first presentation was lodged, there were still six days to run ; and, as the patron was only informed of the presbytery's proceedings of the 18th of March 1761, when they accepted of the first presentee's renunciation, by a letter from the moderator dated the 19th, which was received by post upon the 23d, the remaining six days could only then begin to run, and, of consequence, the patron's right was exercised two days before the lapse of the six months, when computed in the strictest manner that law or reason can admit ; seeing that the second presentation, and the presentee's letter of acceptance, were lodged with the moderator upon the 27th of the same month.

' THE LORDS found, That the right of presentation *pro hac vice*, had not fallen *jure devoluto* to the presbytery ; and therefore assoilzied from the declarator.'

A&. David Dalrymple.

Alt. David Rae.

A. W.

Fol. Dic. v. 4. p. 49. Fac. Col. No 88. p. 193.

1770. August 10.

THE PRESBYTERY of Paisley against DAVID ERSKINE, Esq. ; Patron of the Parish of Erskine.

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A minister of a parish having died on 2d January, and the patron being abroad, a pre-

THE minister of Erskine having died on the 2d January, the parish was declared vacant by the Presbytery of Paisley on the 15th of that month 1759. Lord Blantyre, the patron, being then in Italy, as soon as he was informed of the vacancy, granted a conveyance of his right to David Erskine, in order to his granting a presentation to Mr Walter Young. This disposition was dated

the 8th June; and in consequence thereof; a presentation in favour of Mr Young was granted by Mr Erskine, dated the 30th June—offered to the moderator of the presbytery on the 2d of July—refused on account of that day being a Sunday, but received by him the day following. The acceptance by the presentee was dated on the 1st, and the presentation was then received by the Moderator of the Presbytery on the 5th July.

Some of the heritors having objected to the presentation, as not having been granted within the time limited by law, and that the right *jure devoluto* had accrued to the Presbytery; after some procedure in the church courts, a declaratory action was brought at the instance of the Presbytery, for having the presentation set aside, and for having it found and declared, that the right had *jure devoluto* fallen to them.

In support of this action, it was *pleaded* by the Presbytery,

1mo, It was absolutely necessary that the exercise of the right of patronage should be limited to a precise definite time; as otherwise churches might, and very often would, be kept vacant for ever, or for a long period. This the law disapproved of; and therefore confined the exercise of the right to a period of six months from the time the vacancy happened. According to this rule, the patron's knowledge of the vacancy neither was nor could be the term from which that period was reckoned; as thereby the matter would be thrown entirely loose, and the settlement of churches made to depend on a variety of accidental circumstances.

By the canon law and the statute 1567. c. 7. the time that the patron came to the knowledge of the vacancy was that which was regarded; but as the inconveniency of that rule was soon felt, by the subsequent statutes, no accidental prolongation of the six months was admitted of. The act 1690. c. 23. which gave the Presbytery a *jus devolutum*, made no *salvo* as to the period's running from the knowledge of the event; and the act 10th of Anne, c. 11. not only made no such exception, but fixed down a *terminus a quo*; and therefore in express words declared, that if the patron of a church neglected to present a qualified minister to such church as shall happen to be vacant, "for the space of six months after such vacancy shall happen, the right of presentation shall accrue and belong for that time to the presbytery of the bounds where such is; who are to present a qualified person to that vacancy *tantum jure devoluto*."

The act of the 5th Geo. I. c. 28. went entirely upon the same plan, and made other regulations for enforcing it. It made the acceptance to be part of the presentation; and enacted, that both should be lodged within the said time, that is, within six months, the period fixed by the former statute. It made no exception *de verisimili notitia*, or as to the time in which the vacancy might come to the patron's knowledge; but expressly declared, that unless the presentation and acceptance were lodged within the said time, they could make no interruption. Such was undoubtedly the intention of the law; and though Lord Bankton and Mr Erskine qualified these enactments, and gave them an interpretation

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sensation was not offered to the moderator of the presbytery till the 2d July thereafter, which being a Sunday, it was refused. It was received however the day following, but this being one day after the lapse of the six months, the presbytery brought an action to have it declared, that the right of presentation had fallen to them *jure devoluto*. The Court were of opinion, that there was not ground for the action.

No 41. agreeable to the statute 1567, their opinion could not be set up in opposition to the express words of the legislature.

2do, As the law was unquestionable, it was only necessary to shew that the circumstances were such as were struck at by the enactment. The incumbent died on the 2d January 1769, and it was not till the 3d of July thereafter, that the presentation was lodged with the Moderator under form of instrument; so that the six months were not at any rate expired. The answer, that it had been offered to the Moderator on the 2d of the month would not avail; that day was a Sunday, and the law did not allow any *actus legitimus* to be gone about on that day, even though a hardship might arise from the prohibition. Many instances of this rule could be given, such as a summons of interruption of prescription, or the protests of bills. The offer, besides, in the present instance upon the Sunday was even too late; for as the vacancy commenced on the 2d of January, the six months, reckoning *de momento in momentum*, were completed on the 1st of July, so that if both the 2d of January and 2d of July were to be taken into computation, the result would be six months and a day.

3tio, The acceptance of the presentation was clearly without the period. By the act 5th, Geo I: c. 28. the lodging the letter of acceptance within the six months, was a co-requisite with the presentation; that too most justly; for if a period had not been fixed for the one as well as the other, the settlement of churches might still in an arbitrary manner have been delayed. Now the acceptance was not lodged till the 5th of July; and though it was said to have been signed on the 1st of that month, yet, by the word *accept*, the statute never could mean the bare subscription of the presentee; nor could the public notified acceptance be held as taking place till the letter was delivered.

Pleaded for the patron, the defender;

1mo, As it was the intention of the law, by the restriction upon the right of patronage, merely to guard against the fault or neglect of patrons, it never could be meant to limit that right, when he was guilty of neither. A patron was not in fault till such time as he was made acquainted with the vacancy; and hence the prescription against him could not begin to run but from that period. Such avowedly was the ancient law of this country. The canon law observed that rule; and by the statute 1567, c. 7. the right of *devolution* was expressly declared to have accrued only after six months from the time that the vacancy came to the patron's knowledge. The same rule did not appear to be altered by the subsequent statutes, neither during episcopacy, when the right of *devolution* fell to the Bishop, nor after it was abolished, when it fell to the presbytery; nor did it ever take place but when the patron neglected to present within six months after the death might have come to his knowledge; or in case of deprivation, within six months after the sentence.

By the statute 10th of Anne, c. 11, patronage was revived, and every thing restored to the same state as they were in before the act 1690. Though in that statute, therefore, the words, after the vacancy may have come to the patron's

knowledge, were not repeated, yet as the intention of the enactment was to restore the right of presentation entire, the mere omission could not be construed into a repeal of the former law. This doctrine was laid down by Lord Bankton, v. 2: p. 23. § 59.; by Mr Erskine, b. 2. t. 1. § 9.; and in the case 2d March 1762, Parish of Monkton, No 40. p. 9961, the claim of the presbytery to present *jure devoluto* was, in circumstances extremely similar to the present, rejected.

2do, As the presentation in Mr Young's favour was tendered to the moderator of the presbytery on the 2d July, and as the 2d of January, the day the last minister died, could not be reckoned in the computation, the six months, even according to the strictest interpretation, were not expired. The presentation, on account of its being rendered upon a Sunday, was indeed *refused*, which was wrong; for as the execution of hornings, intimation of sales, and other judicial matters, were allowed on that day by law, there was less reason why a notification of this kind should have been rejected. In many instances, the execution of diligence, and other matters relating to civil rights, had been sustained, though done upon a Sunday. 24th February 1627, Earl of Cassillis *contra* Macmartin, *voce* SUNDAY; 26th June 1628, Lord Newark *contra* Maxwell, *IBIDEM*. But whatever doubt might be entertained as to the validity of acts of that nature, when done upon a Sunday, there could be none with regard to such an act as the present, which was not only an act of necessity to save a just right, but one respecting the concerns of the church. The rejection indeed made no difference; for, by the *offer*, the presentation was out of the patron's hands, so far as it depended on him; which sufficiently discharged his duty.

3tio, As to the acceptance by the presentee, the act 5th Geo. I. c. 28. by which that matter was regulated, mentioned no particular time, within which it must be made. But although that act had, in express words, prescribed that the acceptance was to be made by the presentee within six months, to be reckoned from the death of the last incumbent, the terms of the statute would, in the present instance, have been strictly complied with. The acceptance was dated the 1st of July, within the six months; and though it was not received by the moderator till the 5th, yet as the words of the statute said nothing with regard to the acceptance being lodged, but required only that the presentee shall accept, or declare his willingness to accept, of the presentation within the said time, every requisite of the statute was, by the declaration of the 1st July, expressly fulfilled.

In giving judgment, the Court was chiefly swayed by the facts which occurred, viz. That the presentation was lodged with the moderator, and accepted of by the presentee, within the six months prescribed, even computing that period from the very day the vacancy happened by the death of the former incumbent; and that by the steps which, in the present instance, had been followed, the enactments of the statutes had been sufficiently fulfilled.

No 41.

Upon advising informations, the LORDS sustained the defence, and assolized the defender.

The presbytery gave in a reclaiming petition; in which, besides the former, the following additional points were argued:

1^{mo}, By the statute 10th of Anne, c. 12. § 6. it was enacted, that all patrons, at or before presenting a minister, shall take the oath appointed to be taken by persons in public trust; and in case of refusal or neglect, that such presentation shall be void, the right to devolve to her Majesty, who might accordingly present a qualified person within six months. Lord Blantyre, the patron, previously to the presentation by Mr Erskine, had granted a presentation to Mr Young, which, on the 30th June, had been presented to the moderator of the presbytery, but immediately thereafter withdrawn. The reason was obvious; for as Lord Blantyre had not taken the necessary oaths he was apprehensive that he would thereby have lost his right of presentation; and the conveyance to Mr Erskine was then devised, in order, if possible, to save the right, and still to present to the same person. By the presentation, however, which Lord Blantyre had actually given and signed, and which had been presented to the moderator, his right, as he had neglected at the same time to take the oaths required by statute, was, *ipso facto pro hac vice*, lost, and devolved upon the Crown.

The forfeiture having been incurred, it was not in Lord Blantyre's power, either by withdrawing the presentation, to reinstate the right in his own person; or, by conveying the right of patronage to another, by that means, through the medium of Mr Erskine, radically to preserve the right, which, by the enactment of the statute, was declared to be forfeited for the neglect. The enabling a non-juring patron to present in this manner was such a device as was called by the Civilians, *fraus legi facta*, l. 29. and 30. *D. De legibus*; and it was *triti juris*, that an act of this description, in defraud of the law, was equally ineffectual with a direct breach of it. The consequence here was obvious; the right had devolved to the Crown, but having been neglected to be exercised within the six months limited, the *jus devolutum* of the presbytery fell again to take place in the same manner as if no presentation had been signed at all.

2^{do}, By the statute 5th Geo. I. c. 29. it was declared, that all persons presenting themselves for trial to be licensed to preach, or to be ordained a minister, shall, upon being admitted or ordained, take and subscribe the oath of abjuration, and be furnished with a certificate of their having done so; and by another clause of the same statute, it was enacted, that if any expectant of divinity shall apply to any presbytery in order to be ordained or licensed, without a certificate of his having taken the above oaths, he shall be liable to imprisonment, and shall be incapable of enjoying any benefice, by virtue of any presentation, as a minister of any parish, for the space one year. This enactment applied expressly to the present question. The presentee, neither qualified by taking the oaths required when licensed to preach, nor when, in conse-

quence of his presentation, he applied to the presbytery to be ordained minister of the parish of Erskine. The consequence of these facts was equally obvious; for as the patron had presented a person not qualified, in terms of this statute, the presentation was of no avail; and the *jus devolutum* took place in the same way as if no such presentation had been given.

Answered for Mr Erskine ;

1mo, The pursuer's new ground of challenge proceeded entirely upon the assumed fact of Lord Blantyre's being a non-juring patron; but of this there was no proof; and it neither could nor would be presumed. But although it were founded on fact, still, by the statute in question, the sole benefit of the forfeiture was given to the Crown, not to the presbytery; and hence it was *jus tertii* to the presbytery to found on the right of the Crown, which had made no claim, nor brought any declarator to ascertain the forfeiture. But though the plea maintained had been competent in law, there were not *termini habiles* in the present instance to support it. The presentation founded on was said to have been signed by Lord Blantyre in Italy; and hence, admitting that to be the fact, it never could be the meaning of the law to impose a forfeiture of this kind on account of a patron's not qualifying at a time or place where it was impossible for him to do it. The statute could only be held to apply to a presentation which had been followed out and made the ground of judicial proceedings, in order to a settlement. A patron may alter his mind and recal his presentation; and as, in the present case, it had merely been delivered, and immediately withdrawn, without having been given in to the presbytery; nothing was done by which the forfeiture could be incurred.

The second branch of the objection, that Lord Blantyre could not evade the statute by granting a conveyance of his right to another, stood also on the assumed ground of his being a non-juring patron. Though the fact had been so, it was of no consequence. There was no law or statute which disabled a person not qualified to government from holding the right of a patronage; nor did any law exist by which a non-juror was disabled from alienating such a right to any one he might think fit. Penal laws were not to be extended; so that though the law had gone so far *in pœnam* as to restrain a non-juring patron from presenting, it had not gone still farther, and restrained him from alienating the patronage itself.

2do, It was an established rule, that in questions arising upon penal enactments, the most favourable construction was to be received. By the first clause of the statute founded on, it was provided, That every expectant, &c. shall, 'upon his obtaining a licence to preach, or being admitted or ordained to be a minister, take and subscribe the oath,' &c. As these words imported the alternative of being licensed or ordained; hence, if he got himself qualified between the one period and the other, he sufficiently satisfied the law; and as Mr B was not yet ordained, there was no defect which could not, in terms of the statute, be removed. This was agreeable to the general understanding, and to the practice of the clergy of this country. The oath

No 41.

or never taken by probationers before they were licensed; the common time for qualifying was after they had got a presentation, and were in the course of obtaining a settlement; so that as the taking the oaths before being admitted and ordained was sufficient to remove the objection of disqualification, and save the presentee from penalties, it must, *a fortiori*, be sufficient to save the patron's right from forfeiture.

THE LORDS adhered.

Lord Ordinary, *Monboddo*.
Clerk, ———.

For the Presbytery, *Maclaurin, Crosbie*.
For D. Erskine, *Craig, Rae*.

R. H.

Fac. Col. No 42. p. 115.

1776. August 2. PRESBYTERY OF STRATHBOGIE against SIR WILLIAM FORBES.

No 42.

SIR WILLIAM FORBES of Craigievar being abroad while the church of Grange, of which he was patron, became vacant, his mother Lady Forbes, factrix and commissioner for her son, in virtue of a commission empowering her 'to pursue and defend all actions, civil or criminal, whenever he or his estate might be concerned, till he should attain the age of 21,' granted a presentation before the expiry of the six months, but after the period of her son's majority; though, as being abroad, he had never recalled his commission, and she had continued to exercise every act of administration relative to his affairs. The Lady, however, to obviate any objection to her title, procured from her son abroad a ratification of all she had done, and particularly of the grant of the patronage; but this did not arrive till after the expiry of the six months; and the presbytery, in the mean time, had declared the *jus devolutum*, rejected the presentation, and given another in favour of a person of their own choosing. In a declarator brought by the presbytery for supporting their presentation, it was urged for the patron, that the *jus devolutum* cannot fall but through the patron's neglect to exercise his right during the legal term; but here there had been no neglect on his part; for his mother, whose administration, even if questionable, he had ratified, had within the legal term exercised his right. THE LORDS repelled the defences, and decerned in the declarator. See APPENDIX.

Fol. Dic. v. 4. p. 49.

1795. May 15.

No 43.

The six
months with-
in which pa-

LORD DUNDAS and MR JOHN NICOLSON against The PRESBYTERY of Zetland, and MR ARCHIBALD GRAY.

MR JAMES BARCLAY, minister of Unst in Zetland, died on the 24th December 1793.

No 43.

trons are bound to present, run from the date of the vacancy, and not from the period it comes to their knowledge; but if a presentation is signed and dispatched within six months from the vacancy, it will exclude the *jus devolutum* of the presbytery, although from circumstances not imputable to the patron, it should not be lodged with the moderator for a short time after the expiration.

Lord Dundas is patron of the parish, and Mr Bolt, his factor in Zetland, wrote to Mr Innes, his Commissioner in Edinburgh, first on the 28th December 1793, and again on the 9th January 1794, informing him of the vacancy.

Mr Bolt's first letter never arrived; but his second was received by Mr Innes on the 30th of January. He forwarded it the same day to Lord Dundas at Newcastle, who got it on the 1st February.

Lord Dundas, 23d May 1794, signed a presentation in favour of Mr John Nicolson, which he immediately transmitted to Mr Innes, who, without loss of time, wrote to the presentee for his letter of acceptance, licence, &c.; and, upon receiving them, he forwarded the whole, along with the presentation, to Mr Bolt, on the 16th June, by a vessel from Leith bound for Lerwick.

The vessel, it was alleged, met with contrary winds, and did not arrive at Lerwick, till the evening of the 26th June.

On the forenoon of that day, being the second after six months from Mr Barclay's death had expired, the presbytery of Zetland met, in terms of an adjournment from the March preceding; and their moderator having received no presentation for the parish of Unst, it was proposed, that, in virtue of their *jus devolutum*, they should immediately proceed to the appointment of a minister.

Mr Bolt, who attended the meeting, upon this represented, that he had received a letter from Mr Innes, dated 5th June, mentioning, that the presentation in favour of Mr Nicolson had been signed some weeks before; that he expected its arrival every hour; and therefore he requested 'the presbytery would delay proceeding in the matter for a limited time.'

It carried, however, by the moderator's casting vote, to refuse the delay; and a petition in favour of Mr Archibald Gray, from some of the heritors and elders of the parish, having been read, they, *de plano*, appointed him to the charge, and fixed a day for his settlement.

One of the ministers present took a protest against these proceedings; and Mr Bolt having received the presentation in the evening, he waited on the moderator, and required him, under form of instrument, to receive it, and to take the necessary steps for Mr Nicolson's settlement.

The presbytery having, nevertheless, settled Mr Gray on the day appointed, Lord Dundas brought an action against them and Mr Gray, concluding, that it should be declared, 'That he had exercised his right as patron within the time required by law; and that the presentation granted by him in favour of Mr Nicolson was valid and effectual.'

In defence, it was

Pleaded; By our ancient law, a lay-patron was obliged to present within four months after the vacancy; Reg. Maj. b. 1. c. 2. § 3. Afterwards, by 1567, c. 7. where a vacancy happened by the incumbent's death, six months were allowed to the patron from his knowledge of it; and by 1592, c. 117, where the vacancy arose from his deprivation, he was allowed six months from the time the extracted sentence of deposition was shown to him. But patronage was a-

No 43.

abolished by 1690, c. 23; and although the rights of patrons were restored by 10th Anne, c. 12, yet this was done under certain modifications. The legislature saw that it was a great hardship on parishes, when their patron was in a distant country, that they should want a minister for such a length of time as was necessary, to give him six months for filling the vacancy after its notification; it would also occur to them, that it might be often difficult to ascertain when that notification was actually received. Accordingly, by § 3. of that statute, it is declared, ' That in case the patron of any church aforesaid shall neglect or refuse to present any qualified minister to such church, that shall happen to be vacant the said 1st day of May, or shall happen to be vacant at any time thereafter, for the space of six months, after the said 1st day of May, or after such vacancy shall happen, that the right of presentation shall accrue and belong for that time to the presbytery of the bounds where such church is, who are to present a qualified person for that vacancy, *tanquam jure devolutio.*' From which it is evident, the right of patrons is limited to six months from the death of the incumbent; and such is the opinion of Forbes (Inst. Part. I. p. 52.) who lived at the time the act was passed.

Answered; It is admitted, that by the statutes 1567, c. 7. and 1592, c. 117, patrons were allowed six months for presenting from the time they got notice of the vacancy. Now the declared object of the 10th Anne, was to put the right of patronage precisely on the same footing on which it stood before the act 1690; Bankton, b. 2. t. 8. § 59.; Erskine's Principles, b. 1. t. 5. § 9.; Institute, b. 1. t. 5. § 17.; 2d March 1762, Pror. for the Church against Earl of Dundonald, No 40. p. 9961.; 10th August 1770, Erskine against Presbytery of Paisley, No 41. p. 9966. It is entitled, ' an Act to Restore patrons to their ancient rights;' and even the clause founded on by the defenders, although somewhat inaccurately expressed, will not bear the construction they put on it. It only deprives the patron of his right, if he ' neglect or refuse,' to present within the six months; an expression which evidently implies, that he must be made acquainted with the vacancy before they begin to run.

Besides, were the construction put on the clause by the defenders adopted, patrons might in some cases be deprived of their right before they could hear of the vacancy; and in many, they would have much too little time for making proper inquiries respecting the qualification of candidate; hardships to which it is not to be presumed that the legislature meant to subject them.

Supposing, however, the construction contended for by the defenders were well founded, Lord Dundas has complied with it. As he subscribed the presentation within the six months, he cannot be said to have either neglected or refused to exercise his right for that period. It is true the statute 1567 required, that the patron should, within the six months, transmit the presentation ' to the superintendent of the partis quhair the benefice lyes.' But this requi-

site is wholly omitted in the 10th Anne; and if it is true, as the defenders argue, that an alteration has been made on the ancient rights of patrons by that statute, Lord Dundas is entitled to say, that under it he has, by signing the presentation within the six months, done all that is required for preserving his right.

The Lord Ordinary reported the cause.

When it came to be advised, two of the Judges thought, that the words of the 10th Anne clearly imported, that patrons were to present within six months from the vacancy. They also thought, that it was requisite that the patron should lodge the presentation within that period, and that therefore the action fell to be dismissed. One of the two even doubted, whether the presbytery could wave or renounce their *jus devolutum*.

The rest of the Judges (one excepted) also concurred in thinking, that the 10th Anne had altered the former law, and that the six months now commenced from the death of the last incumbent. But although this alteration (it was observed) is in the main beneficial, as it prevents all disputes about the period when the notification is received, the statute is not to be judaically interpreted. Lord Dundas executed the presentation a full month before the time limited; and it was owing to unforeseen accidents, in no way imputable to him, that it did not reach Zetland before it expired.

THE LORDS "repelled the defences, and found and declared in terms of the libel."

Lord Ordinary, *Esqgrove*.

Act. *Dean of Faculty Erskine, Ch. Hay.*

Alt. *George Ferguson.*

Clerk, *Menzies.*

R. D.

Fol. Dic. v. 4. p. 50. Fac. Col. No 170. p. 401.

See APPENDIX.

APPENDIX.

PART I

PATRONAGE.

1777. July.

Miss BRODIE of Lethem *against* The Earl of MORAY, *et é Contra*.

MUTUAL actions of declarator were brought by the Earl of Moray and Miss Brodie of Lethem, against each other, concerning the patronage of the parish of Kinloss, vacant by the death of the last incumbent. This parish had been erected in 1661, out of parts of the two adjoining parishes of Alves and Rafford; whereof the patronage of the former belonged to the Earl of Moray, and that of the other, to the family of Lethem and Lord Spynie alternately. The Court at first, (26th February 1777,) sisted all procedure until the heirs or representatives of Lord Spynie were called in this suit; and appearance was made, in consequence of this interlocutor, for the Duke of Gordon, who sisted himself as in the right of Lord Spynie.

No. 1.
Alternate
right to pre-
sent.
See No. 22.
p. 9937.

It was contended by Miss Brodie, that from the very nature of the erection of this parish, the patron of Rafford was entitled to at least an equal voice with the patron of Alves; for as that erection had been made equally from these two different parishes, the patrons of both should retain their former rights, and should therefore present alternately to the new one. That this is both agreeable to the act 1621, cap. 5., and 1617, cap. 3. § 3. That, therefore, it is not only agreeable to law, but to the general practice of the country, that in such an erection the patronage should alternately belong to each of the two respective patrons of those parishes, from which the new one had been disjoined; and in this view, Miss Brodie's claim must be preferred, as it could not be denied, that the Earl of Moray had granted the last presentation to that parish in 1752.

- No. 1. To this it was answered, That, even supposing Miss Brodie had the sole right to the patronage of Rafford, instead of possessing it only alternately with the person in the right of Lord Spynie, yet she could not be found to have right to any part of the patronage of Kinloss, because about two-thirds of the stipend of Kinloss is paid out of the lands in the parish of Alves, and the church itself appears to have been situate in that parish : As, therefore, the Earl of Moray, upon the erection of Kinloss, had double the interest in that parish which both the joint patrons of Rafford could pretend to, it was a just and legal consequence thereof, that, instead of the patronage of Kinloss being split into fractions, it should wholly accresce to the Earl as patron of Alves. But in short, if there could have been any room to dispute the Earl's sole right of patronage, as matters originally stood, yet his right is now firmly established by the positive prescription, and any right which the family of Lethem could have had, is cut off by the negative prescription. For the first minister in this parish was settled by a popular call in 1657, while patronage was abolished. The second incumbent was clearly presented by the Earl of Moray in 1665 ; when the Bishop's letter to the presbytery shows, that he had received a presentation from the Earl of Moray, naming Mr Alexander Dunbar to be minister of Kinloss. The next settlement that appears on record, is that of Mr George Jones, 7th June 1670, in virtue of a letter from the Bishop to the moderator, for transplanting Mr Innes from Bremnay to Kinloss. And it may be presumed, that this was also in consequence of a presentation from the Earl of Moray. The next vacancies in this parish were supplied while patronages stood again abolished by the act 1690 ; and the last incumbent was presented by the Earl in 1750, although the Laird of Lethem now for the first time protested, that his right should not be hurt by this presentation, but that he should be entitled to the next *vice*. Upon this possession, it was contended by the Earl, that he had established his right, or supplied the defect in his right, if there had originally been any, in the same way as a title to a certain tenement *per expressum* will, through possession for a requisite time, be made to comprehend what was originally part of another tenement, by rendering it *part* and *pertinent* of the tenement to which it is acquired. Now, as the Earl had a good title to the *patronages of the churches and chaplainries of the lands and earldom of Moray*, and has likewise specially a right to the *patronage of the church of Alves*, he apprehends, that either of these titles is sufficient to vest in him, through prescription, a good right to the patronage of Kinloss. And this doctrine of prescription, in the right of patronage, is confirmed by the case of Earl Home against Officers of State, decided finally in the House of Peers, the 7th of March 1759, No. 76. p. 10777.

To this last argument of prescription, it was answered by Miss Brodie, That No. 1. the only act of presentation ever exercised by the Earl's predecessors since the erection, appears to have been that of Mr Alexander Dunbar in 1663, which cannot affect this question, because the presentation being alternate, the Earl of Moray, as joint patron, exercised no more than his own right when he granted this presentation; and it seems that he was allowed the first *vice*, because he was the *dignior persona*. As to the only other settlement made during the last century, 7th June 1670, there is just as much reason to presume that it had been granted by the family of Lethen as by the Earl of Moray, the Bishop's letter mentioning neither the one person nor the other. And the last settlement, in 1752, was made by the late Earl, by tolerance of Lethen, who was willing to join in the settlement, and therefore did not object to Mr Monroe the presenter, but at the same time he entered a protestation in the Presbytery records, in order to save his right, which being of the same nature with an infirmity of interruption recorded in the proper register, was sufficient to bar prescription, and must prevent that instance being of avail to either party. As, therefore, the sole person presented by the Family of Moray remained in the cure for only four years, there can be no time for prescription; but there also can be no room for prescription, as the title founded on by the Earl of Moray could only give him an alternate right to the patronage, and can never be a title to acquire the sole right by any length of time. So that there was neither possession nor a title for prescription.

The Court found, That Miss Brodie was entitled to this *vice*, and allowed partial decree to be extracted.

Lord Reporter, *Kennett*. For Miss Brodie, *Ilay Campbell*. For Earl of Moray, *David Rae*.

D. C.

1776. August 2.

The PRESBYTERY of Strathbogie against Sir WILLIAM FORBES of Craigievar, Baronet.

SIR WILLIAM FORBES was undisputed patron of the parish of Grange. No. 2. *Jus devolutum.* Upon going abroad during the latter part of his minority, he executed a deed, constituting Lady Forbes, his mother, his commissioner, trustee, and *factrix*, "declaring, That this present commission is to endure and con- See No. 42. P. 9972.

C

No. 2: "tinue until I, with consent foresaid, (of his curators,) recall the same by
 "a writing under my hand, or by attaining the age of twenty-one years com-
 "plete, whichever of these events first shall happen."

Sir William became of age in May 1774. The parish of Grange became vacant upon 16th October following. On 10th March 1775, Lady Forbes, as commissioner for her son, granted a presentation to Mr John Bonnyman.

This presentation, with a letter of acceptance from the presentee, having been in the usual manner produced before the Presbytery, they required evidence of Lady Forbes's authority, and assigned a term for producing her commission. It was not produced on the day of meeting, 17th May 1775. The Presbytery rejected the presentation, and found, that the right of presenting had fallen into their own hands *jure devoluto*. In consequence of an appeal to the General Assembly, the Presbytery were appointed still to receive evidence of Lady Forbes's powers. Her commission before mentioned was then produced, along with another deed by Sir William, dated at Dresden, 28th June 1775, ratifying the presentation granted by his mother. The Presbytery persisted in finding, that the right of presentation had fallen into their own hands, and they raised a summons of declarator, to have it found, that the presentation by Lady Forbes could have no effect; that the ratification could not validate it, being granted long without the six months; and that therefore the right of presenting had fallen to the pursuers, *tanquam jure devoluto*.

Argument for the pursuers.

The statute 10th of Queen Anne, c. 11. distinctly limits the right of the patron to six months. Now the patron did not present within that time. The commission to Lady Forbes had expired in consequence of the majority of Sir William. It is doubtful whether a patron can delegate to another his right of presenting. But certainly, however that may be, a commission, if at all legal, must contain special authority to grant the presentation to a particular person, whereas Lady Forbes's commission is entirely general, and contains no particular power to that effect. A right of patronage implies in it a trust of considerable importance, in the exercise of which, there is a *delectus personæ*, of moment to the church, and to the public. The right of choice is entrusted to the patron personally, and cannot be delegated. A patronage is indeed an alienable subject, but then the donee comes precisely in his author's place; but a faculty or commission, which does not denude the grantor, is evidently a very different thing. It will be found, that, in practice, a right of presenting is never executed in virtue of a general commission. Even the general commission, however, in the pre-

sent instance, had expired by the majority of the granter, as has already appeared from its terms. No. 1.

Lady Forbes may have continued to manage her son's affairs while he remained abroad after his majority; but in doing so, she was a *negotiorum gestor*, not a factor. Her general administration may have been a proper subject of ratification. But such a manager is vested with no active title, nor can the rights of third parties be affected by management of that kind without their consent. If a *negotiorum gestor* were to bring an action for a debt due to his absent friend, no court of law would force the debtor to pay. If a *negotiorum gestor* were to use an order of redemption of a wadset by premonition and consignation, a declarator of redemption could not be founded on that order contrary to the wadsetter's consent. The wadsetter would be entitled to object, that the order had been used by a person who had no authority for using it. Those, therefore, who voluntarily transacted with Lady Forbes, after her son's majority, might perhaps be safe, and Sir William might have been barred from challenging her transactions. But as none can present except the patron himself, or one specially authorised, Lady Forbes, taking upon her to present without any authority, could not thereby deprive the Presbytery of a right which the law had established in their favour.

If the vacancy had happened during Sir William's minority, and while he was abroad, his curator could not have granted the presentation; for curators cannot act of themselves: They can only consent to acts of the minor. Neither would the Court have interfered to authorise a factor *loco tutoris* to grant a presentation. The law has established a right in favour of presbyteries, of presenting to vacant churches, if the patron does not exercise the right within six months; and the Court will not authorise one to act in place of the absent person, to the effect of depriving the Presbytery of the right which the law has vested in them. The *jus devolutum* of the Presbytery is not a forfeiture of the patron's right. The right of the patron is not absolute but qualified, of which the *jus devolutum* is the natural result.

The deed of ratification must go for nothing. The six months were elapsed before it was signed. The presentation, as has been shewn, was granted *a non habente*. The after deed of ratification could not make it better, because the time within which Sir William could exercise his right, was previously elapsed. When the act *de quo quæritur* may be performed at any time, the rule, *Ratibabitio mandato æquiparatur*, will take place. But if the act is to be performed within a limited time, the ratification must be executed within that time; if not, the deed of ratification flows *a non habente*, as much as the deed ratified.

... .. GIZ

No. 2. The statute 1567 enacts, That "the patron present a qualified person " within six months *after it may come to his knowledge*, of the decease of " him who bricked the benefice of before." Lord Bankton, from these expressions, ^s says, that the six months can only commence from the patron's probable knowledge of the vacancy; but the statute 10th of Queen Anne must regulate the matter, which expressly enacts, that six months shall run " after such vacancy shall happen."

By the canon law, four months were allowed to the laity, and six to ecclesiastics. The same was the law of Scotland prior to the statute 1567, as appears from Sir George Mackenzie's observations on that statute. At that time it was of little moment whether the six months were to commence from the actual vacancy, or from the patron's probable knowledge of it, as patrons had little occasion to be at a distance from their ordinary place of residence. But the situation of Scotland had come to be very different, when patronage was restored by the statute of the 10th of Queen Anne. Commerce had become extensive. Patrons, in the course of their affairs, might be in the most distant countries, and great inconveniency and hardship might have often occurred, if the six months were to have been counted only from the time of the patron's knowledge of the vacancy. The opinion delivered by Bankton, Vol. 2. p. 23., is supported by no authority or decision, and seems to be very questionable. But even Bankton says, That "the patron's knowledge is to be presumed, after such time as " advice could have been had from the place where the incumbent died, to " the place of the patron's residence." Sir William Forbes might have been informed at Dresden, in a fortnight, of the incumbent's death. So that still the deed of ratification is far without the six months.

It has been said, that the plea of the Presbytery is unfavourable, as founded on a mere neglect in the patron. But the pursuers are only claiming a right, as distinctly given to them by the statute, as the qualified and limited one out of which theirs result, is given to the patron.

Argument for the defender.

The Presbytery seem to misapprehend the nature and purposes of the *jus devolutum* with which the law has entrusted Presbyteries, in the view of enforcing the timeous exercise of the right of patronage. It never was the intention of law to create a rigorous forfeiture of the patron's right, or to confer a substantial right upon the Presbytery. The *jus devolutum* presupposes a neglect of the patron as its basis; therefore, if there has been in fact no neglect, if there has been no undue delay, there is no *jus devolutum*. The patron is the favourite of the statute, and when he appears to have meant to exercise his right fairly and *bona fide*, it is the spirit of the law that it should be effectual. These observations are obviously applicable to the present case. Sir William Forbes was abroad. He entrusted his mother with the unli-

imited management of his affairs. In the course of that management a vacancy in a church, undoubtedly in his gift, occurs. She immediately transmits a presentation to be signed by him, which accidentally does not reach him, so as to be returned in due time. By the powers already vested in her, she executes a presentation herself, as his commissioner, which he approves of and ratifies. Every thing, then, is done which the circumstances admit of towards exercising the right in due time. There ought, therefore, to be no *ius devolutum*.

If Lady Forbes had held no commission, and had acted merely as *negotiorum gestor*, it may be true, that she could not have insisted on completion of her presentation, contrary to her son's wish; but here, he is not disapproving, but heartily approving of her conduct. Surely, then, third parties have no title to interfere, especially while pleading the want of power, for the purpose of creating a forfeiture in their own behalf.

If the vacancy had happened during Sir William's minority, and while he was abroad, there can be no doubt, that if his curators had presented, even without his concurrence, the right would have been preserved; although such an act of management, if he had been at home, would have been invalid. In like manner, if a factor *loco tutoris* had been applied for during his absence abroad, and granted by the Court, such factor might have legally presented. The reason of both is the same;—That every lawful act, for the benefit of the person absent, will be sustained to protect against a penal forfeiture.

The express ratification by Sir William, as soon as the matter came to his knowledge, must put the matter beyond all doubt. *Ratibabitio mandato equiparatur*; and this ratification must operate *retro* to the date of the act itself; more especially when it is not pleaded to the effect of depriving any third party of a right, but in order to bar a claim maintained by parties who had no radical or competing right in their own person, but would only have been entitled to be heard upon the presupposal of a forfeiture incurred by him.

That ratification operates *retro* to the date of the act ratified, does not seem to be denied. But it is pleaded, that the ratification itself was long after the six months, and therefore ineffectual. But it is of no consequence whether the ratification was within or without the six months. The Presbytery are only entitled to plead upon a supposed neglect in the patron. The presentation by Lady Forbes upon the presumed approbation of her son, barred any foundation for supposing such neglect. And the ratification, at whatever time it was lodged, proved equally the *reality* of that consent which Lady Forbes had presumed. The act and the consent, therefore, must, in the eye of law, be considered as both intervening before the expiry of the six months.

No. 2. The argument of the pursuers proceeds upon a mistake in point of law. The six months do not run from the day of death of the incumbent, but from the time of the probable knowledge of the patron. Such is the doctrine of the canon law. Such is the enactment of the 7th act 1567, which statutes, "That a patron shall present within six months after it may come to his knowledge of the decease of him who bruicked the benefice of before." Suppose the case reversed, that the patron had been at home, and the minister had died abroad, could it have been maintained, that the patron's unavoidable ignorance of the fact, should be the cause of forfeiting his right, or that the same ignorance in the Presbytery should be their *modus acquirendi jure devoluto*?

The statute of Queen Anne does not narrow the ancient right of patrons, nor enlarge the *jus devolutum*. The former are put upon the footing of the ancient laws and constitutions, whereas the latter is limited and abridged in every possible case; as, for example, in the case of a patron who grants a presentation, but refuses or neglects to take the oaths, or in the case of patrons known or suspected to be papists, and who do not purge themselves of popery, at or before signing the presentation. In all these cases, the right for that turn falls to the Crown, not the Presbytery, and a second term of six months is granted.

The *jus devolutum* introduced by the statute of Queen Anne seems to have been copied from the ideas of the law of England, where, in the case of a lapse of six months, the right goes to the ordinary or Bishop; after other six months, to the Archbishop; and after other six months, to the King. Now, in the English law books, it is a settled point of law, that if after a church is lapsed to the immediate ordinary, the patron presents before the ordinary has filled the church, the ordinary ought to receive the clerk; for lapse to the ordinary is only an opportunity of *executing a trust*; Burn's Eccl. Law, *voce* Lapse. And that the act of Queen Anne does not derogate from, but is a ratification of the act 1567, is expressly laid down by Lord Bankton, Vol. 2. p. 23.

As the *jus devolutum* is not a competing right with the right of the patron, but merely a trust; before it can be exercised, it must clearly appear that the patron has incurred a forfeiture of his right. But even supposing a forfeiture to have been here incurred, the same equity must apply to it which is applied to other forfeitures. Thus, in the case of an irritancy incurred by an heir of entail, if any plausible grounds can be condescended upon, or if the forfeiture has not been ascertained by a declarator, and matters be still entire, it is the uniform custom to allow the forfeiture to be purged. The same rule must hold in the present case, where matters are still entire, as no settlement has yet been made. This plea is much strengthened by a late instance. The act of Parliament regulating the election of

magistrates within burghs, ordains complaints to be brought within two months of the proceedings complained of. By the set of the burgh of Pittenweem, the Michaelmas election happens so early in September, that the two months were elapsed before the sitting down of the winter session; yet both this Court and the House of Lords sustained a complaint brought from that burgh, even after the expiry of the time limited by act of Parliament.

The Court pronounced the following interlocutor: "On report of Lord Justice-Clerk, and having advised the informations *hinc inde*, the Lords "repel the defences, and decern in the conclusions of declarator at the pursuer's instance, in terms of the libel."

Lord Reporter, *Justice-Clerk*.

Act. *Macquern*.

Alt. *Henry Dundas*.

W. M. M.

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P A Y M E N T.

1628. *January 26.*ADIE *against* GRAY.

No 1.

AN executor is empowered, *virtute officii*, to apply his intromissions for payment of the defuncts debts; and as he may pay *primo venienti*, so, if he himself be a creditor, he may of course retain for his own payment. It is true, an executor cannot safely pay without decree; but, as he cannot take a decree against himself, he must either be allowed to pay himself without decree, or not at all. And this was found in a case, where an executor, *qua* nearest of kin, had intermeddled before confirmation, and was pursued as vitious intromitter; but having thereafter confirmed within the year, which purged the vitiosity, the confirmation was drawn back, and sustained to found the executor in his right of retention, equally as if he had been confirmed before intromission.

In the same cause the executor was allowed retention of a debt he had paid as cautioner for the defunct, before intenting of the above process against him.

But an executor was not allowed to exhaust the testament by debts, wherein he was cautioner for the defunct, unless he had made actual payment before being interpellated by other creditors; yet he was allowed to plead his claim of relief thus far, to come in *pari passu* with the creditors doing diligence against him.

Fol. Dic. v. 2. p. 50. Durie.

*** This case is No 193. p. 9866. *voce* PASSIVE TITLE.

1662. *January 24.*MR JAMES RAMSAY *against* EARL of WINTON.

No 2.

MR JAMES RAMSAY, as having right by translation from George Seaton, assignee constitute by my Lady Semple, to a bond due by the umquhile Earl of Winton, pursues this Earl for payment, who *alleged*, No process, because.

No 2.

the time of the assignation taken by Sir George Seaton, he was one of the defender's tutors, and so it is presumed that the assignation was purchased by the pupil's means; and as the tutor could have no process thereupon against the pupil, till he had made his tutor's accounts, so neither can his assignee; seeing in *personalibus* all exceptions competent against the cedent are competent against the assignee.

THE LORDS found the defence relevant, unless the pursuer would find caution to pay what should be found due by Sir George, by the tutor's accounts, as they had done before betwixt Grant and Grant, January 15. 1662, *voce PRESUMPTION*.

Fol. Dic. v. 2. p. 50. Stair, v. 1. p. 87.

1671. February 4. ALEXANDER WISHART against ELIZABETH ARTHUR.

No 3.

An infeftment of annualrent found extinct by the annualrenter's intromitting with the rents of the lands equivalent to the principal sum.

See No 13. p. 9989.

UMQUHILE Mr William Arthur being infeft in an annualrent out of some tenements in Edinburgh, and having entered in possession, by lifting of mails and duties, some of his discharges being produced, Alexander Wishart, as now having right to the tenements, pursues a declarator against Elizabeth Arthur, only daughter to Mr William, for declaring that the sum, whereupon the annualrent was constitute, was satisfied by intromission with the mails and duties of the tenements. The defender *alleged*, That this was only probable *scripto vel juramento*, and not by witnesses; for an annualrenter having no title to possess, out-put and in-put tenants, cannot be presumed to uplift more than his annualrent, especially seeing his discharges produced for many years are far within his annualrent, and it were of dangerous consequences, if witnesses, who cannot prove an hundred pounds, were admitted, not only to prove intromission with the rents, so far as might extend to the annualrent, but so much more as might satisfy the principal, and thereby take away an infeftment; for albeit that probation has been sustained to extinguish apprisings, which are rigorous rights, yet not to take away infeftments of annualrent. It was *answered*, That albeit witnesses are not admitted where writ may, and uses to be admitted, *in odium negligentis*, who neglected to take writ; yet this is no such case; and, therefore, in all such, witnesses are admitted; for, if the pursuer had insisted against the defender, for intromitting with his mails and duties, of whatever quantity and time within prescription, witnesses would have been admitted; the defender could only have excepted upon his annualrent, which would have been sustained *pro tanto*; but the pursuer would have been admitted to prove further intromission; which being by virtue of his security for a sum, and in his hand, would compensate and extinguish that sum, which is all that is here craved, and whereupon the witnesses are already adduced.

THE LORDS sustained the probation by witnesses for the whole intromission, to be imputed in satisfaction of the principal sum and annualrents. See PROOF.

Fol. Dic. v. 2. p. 51. Stair, v. 1. p. 714.

*** Gosford reports this case :

WISHART being infeft in annualrent out of lands, and thereupon having entered to the possession, by uplifting the mails and duties of the lands, there was a declarator raised at the heritor's instance, to hear and see it found, that he was satisfied by his intromission, not only of the whole bygone annualrents, but also of the principal sums, the duties of the lands exceeding far the annualrent. It was *alleged* for the defender, That the principal sum being founded upon a contract and infeftment, could not be taken away, but *scripto vel juramento*, and not by witnesses proving his intromission, which could only be sustained as to the bygone annualrents. It was *replied*, That intromission with mails and duties was probable by witnesses; and, if they did exceed both the principal sum and the annualrents, they ought to extinguish the infeftment and annualrent, unless the defender could ascribe his possession to some other cause.—THE LORDS did sustain the summons, notwithstanding of the defence, and found, that an infeftment of annualrent not being a sufficient and proper title for uplifting of mails and duties, but only for poinding of the ground, or resting in the tenant's hands; that his intromission therewith was probable by witnesses; and that he was in the same condition with another person that had possessed *sine titulo*; in which case intromissions are always sustained to be probable *prout de jure*; and therefore, the total of the intromission extending to all that was due by the infeftment, the defender was débtor in so much, and it ought to extinguish his annualrent, unless he would ascribe it to another right; but, if a creditor had comprised the right of annualrent, or gotten a right thereto before the declarator, that intromissions, besides the annualrents, would have satisfied the principal sums; it is thought, that they compearing for their interest, the case would have altered, and that the annualrenter's intromission would not have prejudged them, or taken away the heritable infeftment, and could only have made the intromitter personally liable.

Gosford, MS. No 328 p. 148.

1675. December 21. CLARK against ROBERTSON.

No 4.

ROBERT ROBERTSON having appraised some tenements in Edinburgh, Mr William Clark, as having right to three posterior appraisings, insists for declaring the first appraising void by intromission. It was *alleged* for the first appriser, That he had counted with the common debtor, and had paid him the surplus of his intromission more than his annualrent, and that before any of the

No 4.

posterior apprisers had denounced or apprised, which he might lawfully do. It was *answered*, That intromission by an apprising being the proper and peculiar way of satisfying and extinguishing of it by a special statute, it was equivalent to a renunciation or discharge of the apprising *pro tanto*, which could not be given back to revive the apprising.

THE LORDS found, that the first appriser might restrict himself to his annual-rent, or might repay the superplus more than his annual-rent to the debtor, before any other apprising or denunciation.

Fol. Dic. v. 2. p. 49. Stair, v. 2. p. 389.

* * * Gosford reports this case :

1675. December 17.—In a suspension of multiplepoinding of a tenement of land belonging to William Ruthven of Garnes, there being a competition betwixt the said parties, as having both comprised the tenement, it was *alleged* for William Clark, That he ought to be preferred, notwithstanding that his comprising was posterior, because he offered him to prove, that Robertson's comprising was satisfied by intromission, and so was extinguished; for which there being an act of count and reckoning and receipts produced, granted to the tenants by Robertson, for their whole duties, it was *alleged*, That, notwithstanding of those receipts, yet Robertson did only intromit with as much as paid the annual-rent of his money, and what he had disbursed besides for public burdens, and for reparations of the tenement, and gave in the Laird of Garnes and his tutors the superplus, upon their receipts, and so could not be liable for farther intromission, especially at Clark's instance, whose comprising was posterior to all the years of his intromission, for which he had counted, as said is. It was *replied*, That Robertson having intromitted by virtue of a comprising, and having taken discharges under the common debtor's hand, and his tutor, in prejudice of a second comprising, ought to be liable.—THE LORDS did find, that the intromission being before the second comprising, and it being lawful to the first comprisinger to intromit or not, or to restrict his comprising, having to do with none but the common debtor, it was lawful for him to retain no more than the annual-rents and true disbursements, and the second comprisinger had no interest to quarrel the same, but for years subsequent to his comprising.

Gosford, MS. No 825. p. 520.

1676. June 28.

GIBSON against FIFE.

No 5.

ELIZABETH GIBSON pursues Fife for 100 merks lent by her to him, and referred the same to his oath. He deponed that he received the sum,

and gave a bond for it blank in the creditor's name, and therefore was not obliged to pay it till his bond was retired. The pursuer having also deponed that the bond was lost, and both parties having agreed upon the date, writer and witnesses of the bond,

No 5.

THE LORDS decerned the defender to make payment of the same, the pursuer always, before extracting, finding caution to relieve or repay, if he should be distress by any bond of the same sum, writer, date and witnesses.

Fol. Dic. v. 2. p. 49. Stair, v. 2. p. 434.

* * * Dirleton reports this case :

1676. *June 21.*—A WOMAN having lent 100 merks upon a bond, and the same being lost, the debt or was pursued for payment of the said sum, and did confess that he had truly borrowed the money and granted the bond blank, and he was willing to pay the same, being secured against any pursuit at the instance of any person who might have found the said bond, and filled up his own name therein.

THE LORDS thought the case to be of great difficulty and import as to the preparative, that practice of granting blank bonds having become too frequent; and resolved, in this case, to take all possible trial by the debtor's oath, and likewise, of the date and writers name, and the witnesses in the said bond; and thereafter to ordain the debtor to pay upon surety, that the pursuer should relieve him of any bond that should be found of that date and sum, and written and subscribed by the writer and witnesses that should be found to have been in the said bond.

Clerk, *Gibson.*

Dirleton, No 334. p. 160.

1676. *July 8.*

SPENCE against SCOT.

IN a pursuit for payment of a sum of money, it was *alleged*, That the pursuer's cedent was tutor to the defender, and had not made his account; which defence the LORDS sustained against the assignee; but it was their meaning that the pursuer should not be delayed, and that a competent time should be given to the defender to pursue and discuss his tutor.

No 6.

Reporter, *Glendoick.*

Clerk, *Mr John Hay.*

Fol. Dic. v. 2. p. 50. Dirleton, No 376. p. 184.

* * * Stair reports this case :

No 6.

SPENCE, as assignee by David Scot to a sum of 2000 merks, pursues John Scot, as representing the defunct debtor, who *alleged*, No process, because the cedent was the defender's tutor, *et præsumitur intus habere ante redditas rationes*. It was *answered*, That the pupillarity was past ten years since, without any process, which was a stronger presumption that nothing was due.

THE LORDS found no process till a competent time, in which the tutor counts might be dispatched and closed with his pupil.

Stair, v. 2. p. 442.

1677. July 26.

THE LAIRDS OF RAPLOCH and MONKLAND *against* WILLIAM BAILLIE of Lamington.

No 7.
A debt due by a minor to his tutor or curator, must be understood to be extinguished by intromission; consequently a curator must account for his intromissions before he can claim payment of a debt due by the minor's predecessors.

IN a pursuit against William Baillie of Lamington, for payment of several sums contained in bonds granted by Lamington's goodsir to Raploch, it was *alleged*, No process, because Raploch was one of the defender's curators, and was likewise factor for old Lamington, granter of the bond, and, by virtue thereof, did intromit with the rents of the land, for which he was countable to the defender; likeas, having accepted to be curator, he was liable for all omissions, for which he had never counted to his pupil, and therefore cannot pursue for any debts *ante redditas rationes*. It was *replied*, That the bonds granted by Lamington's goodsir being for liquid sums, long before any curator, cannot be taken away upon pretence of omission, for which he was never called to any account, and neither intromission nor omission being cleared, it can be no ground of compensation, wherein this allegiance resolved; but these true and liquid debts ought to be paid, reserving action for omission and intromissions; and, farther, Lamington cannot give his oath of calumny upon the verity thereof.—THE LORDS having taken the defender's oath of calumny, who deponed not only that Raploch had intromitted as factor to his goodsir, but likewise, that, during the time he was one of the curators, he had reason to believe there were great omissions; they did believe, that, before any decree, there ought to be a count and reckoning, notwithstanding that the debts were prior to the curatory, upon these reasons, that being undoubtedly one of the curators, he was liable for the whole omissions to his pupil, albeit he was not the only author thereof; and that he having intromitted as factor, whereof he had never gotten a discharge, it was presumable that *intus habuit*, and so Lamington the pupil could not be distressed for his goodsir's debt *ante redditas rationes*.

Fol. Dic. v. 2. p. 50. Gosford, MS. No 1004. p. 678.

1679. December 2. CLELAND against BAILLIE of Lamington.

No 8.

The assignee of a curator cannot force payment from the quondam pupil, till the curator settle his accounts.

BAILLIE of Littlegill being debtor to Mr William Sommerville, Mr William arrests in the hands of Lamington all sums due by Lamington to Littlegill, and obtained decret for making forthcoming, which being assigned to several hands, and at last coming to James Cleland, and he having charged Lamington, who suspended upon this reason, that the debt being due originally to Littlegill, who was Lamington's curator, as appears by the act of curatory produced, if Littlegill had been insisting for the debt, Lamington had this defence, that he was his curator, and could not pursue him *ante redditas rationes*. It was answered, That that was only a personal objection, and could not militate against an assignee for a cause onerous; for we have no hypothecation of goods of tutors or curators, for their pupils' means, as was by the Roman law. It is true, compensation is competent against the assignee upon a liquid debt of the cedent; but here there is nothing liquid. It was replied, That though minors have not a hypothec, yet they have this privilege to be free of all their curators' pursuits, till they make an account, which is not merely personal, otherwise it would be of no effect, it being easy for tutors or curators to assign, so that it is not a compensation, but *jus retentionis*.

THE LORDS found the reasons of suspension relevant, that the assignee's author was his curator, providing that the suspender give in a present charge of the curator's omission or intromission; and ordained a count and reckoning to proceed thereupon, to the effect that what should be found due by the curator to the pupil should be allowed in this charge.

Fol. Dic. v. 2. p. 50. Stair, v. 2. p. 713.

*** Fountainhall reports this case.

1679. July 25.—It came to be debated, whether or not a minor in our law (for in the Roman law there is no doubt but he had it) hath a tacit hypothec in the goods of his tutor or curator, ay and until he make faithful count and reckoning to him of his administration? or if a tutor or curator can legally or validly assign or dispoise any debt owing to him by the minor, or his predecessor, or assigned to him by another creditor, and *ante rationes redditas*? “THE LORDS found, that the assignee behoved to account for his cedent's tutorial or curatorial accounts, ere he who was the pupil or minor was obliged to pay him.” See Stair, 24th January 1662, Ramsay, No 2. p. 9977. By this, before one bargain with another either for land, or take an assignation, he must search for acts of tutory and curatory, if the party he deals with was engaged in any, and not yet discharged, since it is found *vitium reale*.

No 8.

1679. *December 2.*—THE point then debated being this day reported, “THE LORDS found Lamington’s defence relevant, being proponed thus, that the cedent, Baillie of Littlegill, was tutor or curator to Lamington; and find, that he is thereby liable to count for the pupil’s means intromitted with by him, or which he ought and should, or might have intromitted with; and ordain Lamington instantly to condescend upon, and give in the particulars wherewith he can charge Littlegill upon the account foresaid.” It was thought a hard interlocutor, that Littlegill’s being curator, and not having yet counted with his minor for omissions and intromissions, the presumptinn *quod intus habet*, and that he may be owing his pupil, should be a *vitium reale*, and meet the assignee for onerous causes by a curator; So that the LORDS find by this, that a minor hath a tacit hypothec in his tutor’s or curator’s estate, which hinders their assigning debts owing to them by the minor or his predecessors, otherways than *cum onere* of counting for the administration. However, the LORDS ordained the count to go summarily on in this same process, and ordained Newton auditor.

1680. *January 27.*—IN the action betwixt James Cleland and Baillie of Lamington, (2d December 1679,) which the LORDS turned into a curator count, Newton being auditor to the count and reckoning, he found Baillie of Littlegill, being one of Lamington’s curators, was not liable for omission in not pursuing upon bonds due to Lamington’s father, or goodsire, unless Lamington would qualify and instruct that Baillie of Littlegill, his curator, knew of these bonds, either by an inventory of the minor’s estate, (for tutors and curators were not bound with us *conficere inventarium*, till the act of Parliament 1672,) or that the bonds, or other instructions of these debts, omitted to be sought in by the curators, were lying in his charter-chest the time of the curatory; or, 3^{to}, That there were rests owing by tenants for years immediately preceding the curatory, and these tenants continued thereafter during the curatory on the ground; or, 4^{to}, That otherways he knew thereof; else he was not an angel to divine there were such rights, or to seek them out *per omnes regni angulos*. *Vide* 24th June 1680, where the contrary was found in this case, upon report (*infra*). Some *alleged*, It was more reasonable that the tutor and curator should be burdened to prove that they searched the charter-chest, and did not find them in it, which, though a negative, yet is *negativa pregnans*; and it is to be presumed against the curators, that the writs were lying in the charter-chest, or (if he had been under tutory) that they were in the tutor’s hands, or lying in processes, or writers chambers, or the like. It is true, since the said act of Parliament 1672, this will not defend any more a tutor or a curator. 2^{do}, Newton sustained it relevant to assoilzie the curator from negligence, that it is offered to be proved, that the debtors either died insolvent, leaving no representatives, or the time of the curatory were commonly holden and reputed to be

bankrupt. See Durie, 6th February 1623, Watson, *voce* TUTOR and PUPIL. Or, 3tio, That he did sufficient diligence against them, *viz.* by horning and denunciation, for affecting their personal estate, or by apprising, to carry the right of their lands; or, 4to, That they are yet responsal, (*de hoc dubito*, for then the curator must once make it up to the minor, and afterwards seek relief and payment of that debtor;) or, 5to, That the minor uplifted it himself, since his majority; or, 6to, That there was an intromitting curator established, and he hath counted to the minor for the same debts, and either had got them allowed, or got a general discharge, which must also accresce to Littlegill, the concurator, seeing *omnes tutores et curatores tenentur in solidum*; so the discharging one after counting liberates all. In this same cause, my Lord Newton found Lamington could not crave that Littlegill, his curator, should count to him for the bygone rests in the tenants' hands, preceding Lamington's goodsire's decease in 1667, unless Lamington produced a title to these rests, either as executor or universal legatar, or a creditor to his grandfather, or that the executry was exhausted by payment of lawful moveable debts; and he found that the naked right and *jus* of being nearest of blood was not sufficient; and found he ought to prove the act of curatory electing Littlegill, and his acceptance of the office, and the true rent of the lands, and that they belong to him and his goodsire, by production of their sasines; as also, that he was minor all the years for which he craves the curator to count to him. Some of the former interlocutors stand in the Clerk's minutes thus: "The Lord Newton, for instructing Littlegill the curator's knowledge, that there were such debts, sustains the being in the charter-chest as a sufficient presumption and proof thereof; and that by witnesses who saw it taken out of the charter-chest after the curator's acceptance. As for Lamington's distresses, as cautioner for Raploch, who was alleged to be principal, and for relief, whereof the said Littlegill, curator, neglected to pursue Raploch, he found the distress alone not a sufficient ground whereupon the curator might have affected the estate of the principal party, unless actual payment had been made to the creditor; except only that he might have served an inhibition; and, therefore, he assoilzied the curator from the article of the distresses, unless Lamington will condescend, that, since the distress, and during the curatory, Raploch hath done voluntary deeds, by which Lamington is prejudged of his relief; which might have been remedied, if an inhibition had been served by the curator against Raploch: And also, *primo loco*, ordains Lamington to prove, that the distresses consisted with the curator's knowledge, in manner above written. Then he sustained this answer made for the curator, that the rents Lamington craved him to account for were either profitably debursed, or employed in Lamington's own affairs, as for his aliment, his debts, annualrents, law-suits, &c. or were uplifted by himself, and expended out and applied to his own necessary uses, or were counted for to him; and wherein the tenants were deficient, that the curators had done diligence for recovery of the same: And the Lords assigned Lamington a day.

No 8. to prove the rental, and his age, for clearing of the time of the endurance of the curatory ; and the pursuer, James Cleland, to prove the way and manner of the payment, and the employment ; and the expending, applying, and employing of the rents to Lamington's use ; and to produce the instructions thereof, and the diligences done against the tenants : *Item*, Found it also relevant to assoilzie the curator from omissions, for not pursuing for Lamington's grandmother's intromission, that the curator offered to prove, that Lamington was her executor or intromitter with her goods ; and if it was in majority, then it should extinguish the whole article ; but if Lamington intromitted in his minority, then he found it relevant to extinguish *in quantum* he uplifted and profitably applied. As to the articles of the curator's omission, that he did not diligence against the relict, to cause them uphold the house of Painston, he ordained witnesses, before answer, to be adduced and examined by both parties, anent the condition of the house at the time of the Lady's entry, and the condition wherein it was at the time of her decease, that the two may be compared together."—A curator is obliged to cause the relict uphold the house, conform to act of Parliament.

To speak a little on this occasion of tutors and curators :—It is relevant to assoilzie a tutor or curator that the minor uplifted the rent himself, but it will be required to make it fully relevant that it be further proved, that either he violently uplifted it by force, or that he profitably employed it ; for what if he did mispend it at cards and dice, then the curators should have hindered him from intromitting. Yet P. Montanus thinks it is to be presumed the minor spent it rationally ; but it is unquestionably relevant for a curator to say, I have expended your rents on your aliment, on the paying of your debts and redeeming of your wadsetts, and on your law suits.

A tutor or curator ought to be very cautious and sparing in buying either the lands, rights, moveables, or other goods of the minor ; for *nemo in rem suam quctor fieri debet*.

A tutor or curator is not in law obliged to lay out the annualrents of his minor's money upon annualrent, but the rents of lands he must lend out after a year, and the annualrents of these monies bear not annualrent till after the expiration of the tutory or curatory, and if then they do not pay them in, they bear annualrent. See 25th July 1673, Rose of Carlstone, *vide* Tutor and Pupil ; 18th July 1629, Nasmith, (See Note p. 6522). But this seems very hard for the minor, if his whole estate consist in money and be opulent, that the tutor should have the benefit of their annualrents, (I suppose they may be 4000 or 5000 merks *per annum*.) and shall convert them to his own use, whereas it is in law *officium gratuitum*.

THE LORDS have commonly found, that a tutor or curator should not, upon his own expense, manage the affairs of his pupil, *nam officium nemini debet esse damnosum* ; and to some tutors they allow L. 4 Scots *per diem*, and to some L. 3, and to others 30 pence, according to the quantity of the estate of the mi-

nor. It oft-times proves no wisdom nor prudence to nominate many tutors to pupils, for each puts off to another, and they neglect, as all things in common are; and one who is faithful will go more commodiously about the management of it than many can do; whereof we want not examples to convince us of the truth of it. *Vide § 1. Instit. De Satisfat. Tutor.*

Tutors, curators, factors, and other administrators, as also creditors, appraisers, wadsetters, and the like, ought not to give down any of the rent they find; but if the tenants refuse to stay at that rent, then they are to fix placarts on the church doors, or intimations in the church, or tickets on burgage-houses, and endeavour to get a tenant at the old rent; and if, after all this diligence, they cannot get it set at the old rent, then they may set it as they can best agree, (first offering it to the debtor upon caution,) though it be for less, rather than suffer the ground to stand waste; or raise a process before the Lords to name commissioners to try the rents. See TUTOR and PUPIL.

1680. *June 24.*—In the action James Cleland against Lamington, which resolved into a curator-accompt, (27th Jan. 1680.) Newton having reported two points debated there, they found, contrary to Newton's own opinion, "That the minor is not obliged to prove that the writs were in the charter-chest the time of the curatory, but that the same is to be presumed, unless the curator offered to prove that the charter-chest was searched, and these bonds and other instructions not found therein; and allow that to be proved by witnesses who made inventory of the writs, or searched the charter-chest, or were present at the searching of it; and allow James Cleland by a diligence to cite the rest of the curators. And as to the other point about the executry, the LORDS, before answer, ordain Lamington to condescend, if during the time of the curatory he was distressed for any debts whereof he might have had relief of the executry, if his curators had confirmed him."

Fountainhall, v. 1. p. 53. 67. 77. & 104.

1680. *January 7.*

JAMES M'BRYDE against My LORD MELVILL and his SON DAVID.

No 9.

In this case a practique was cited, 9th November 1672, Peirson against Crigh-ton, No 80. p. 2672. where the LORDS refused compensation to a chamberlain upon a bond of the constituents, to which he had taken an assignation *ante redditas rationes, vide legem 8. C. De Compensationibus*.—THE LORDS refused to sustain this declarator till his cedent should make up his chamberlain accounts.

Fol. Dic. v. 2. p. 51. Fountainhall, MS.

* * * Stair's report of this case is No 15. p. 2561. *voce* COMPENSATION.

1685. November.

NISBET against SMITHS.

No 10.

An assignee, executor of a pro-tutor, sued the heir as representing his father. *Answered*, The pro tutor had not accounted, and the intromission was after the assignation. The pursuer was required to find caution for the event of the accounting.

AGNES NISBET, as executrix to her husband, having pursued Isobel and Esther Smiths, for payment of certain debts, due by John Smith, their father, whereunto the said Alexander Herriot, the pursuer's husband, had acquired assignations; *alleged* for the defenders, That Mr Alexander Herriot being their uncle upon the mother's side, he had acted as tutor, or pro-tutor, and had intromitted with the rents of the lands before he had acquired assignations to these debts, and therefore they could not be liable for payment of the same, before the pursuer, as executrix, should count and reckon for the husband's intromission; and they had raised an action of count and reckoning, which they repeated. *Answered*, That Mr Alexander Herriot was assigned to the debts before his intromission; and albeit the assignation had been after, yet this pursuit being for a clear and liquid debt, and the defence resolving in compensation, and the intromission not being liquid, nor constituted, it cannot be sustained to stop the pursuer's diligence for these debts.—THE LORDS sustained the defence, that the pursuer's husband acted as tutor, or pro-tutor, before acquiring the assignations to the debts.

Fol. Dic. v. 2. p. 50. Sir P. Home, MS. v. 2. No 726.

* * Harcarse reports this case :

1685. February.—AN assignee, executor of a pro-tutor, pursuing the heir as representing his father;

It was *alleged* for the defender; That the defunct being pro-tutor to the defender, *intus habuit*, and he has not counted as pro-tutor; and the assignation was after the intromission.

Answered; The cedent had right to the defunct's father's bonds in his own time; and the presumption ought only to hold where the tutor *durante tutela* acquired right to the defunct's debts, which is presumed to be acquired *nummis pupilli*.

THE LORDS, by one supernumerary vote only, repelled the defence, and ordained the pursuer to find caution for the event of the pro-tutory action; and that which principally moved them to pronounce this interlocutor, was, because the pro-tutor had not been called to account after elapsing of several years. Many of the Lords were of opinion, that the defence should be sustained, and the pro-tutory, count and reckoning, go on in this process.

Harcarse, (TUTORS and CURATORS.) No 983. p. 277.

* * In conformity with the above was decided the case Lord Melvil against Montgomery, 13th December 1676, *vocæ* TUTOR and PUPIL.

1687. February 5. LADY NEWMILLS *against* ISOBEL and ESTHER SMITHS.

No 11.

FOUND that a right acquired to a defunct's bond before the acquirer became tutor or pro-tutor, &c. to the debtor's son, is not presumed taken to the pupil's behoof. But compensation was sustained upon this ground, that the tutor had not compted for his intromissions with the defender's means; for which a process was depending at the defender's instance against the tutor's representatives, and ready to advise; the same *mox liquidandum*. See TUTOR and PUPIL.

Fol. Dic. v. 2. p. 50. *Harcarse*, (TUTORS & CURATORS.) No 99c. p. 279.

1688. February 15. LORD CHANCELLOR *against* BROWN.

No 12.

AN improper wadsetter having given the reverser a back-tack, for payment of a tack-duty equivalent to the annualrent, and upon failure of payment, having apprised the lands for the tack-duties resting owing; and upon that title having uplifted sufficient to extinguish, not only the apprising, but also the wadset sum; this irregular intromission was found not equivalent to real payment, so as to extinguish the wadset, and consequently to hinder the ward to fall by the wadsetter's death.

Fol. Dic. v. 2. p. 51. *Harcarse*.

*** This case is No 8. p. 3012, *voce* CONFIRMATION.

1705. January 2. THE HEIRS OF LEARMONT *against* GORDON.

No 13.

SUPERINTROMISSION was not imputed in extinction of the debt, where the question was with a singular successor, who had acquired an infeftment of annualrent for an onerous cause; for intromission *sine titulo* is not legal payment to operate a real extinction. The debtor has his option to demand payment of the rents from his creditor, as intromitted with *sine titulo*; and if a personal objection lie against the creditor, making the intromission equivalent to payment *quoad* him, but not *quoad* the debtor, this cannot militate against a singular successor. See No 3. p. 9978.

Fol. Dic. v. 2. p. 51.

*** This case is No 12. p. 574, *voce* ANNUALRENT, INFESTMENT OF.

1707. February 27. CAMPBELL *against* MALCOLM MACAULAY.

No 14.

ALEXANDER ROBERTSON couper in Leith, being debtor to Anna Campbell, relict of Adam Gordon, merchant in Leith, in a certain sum; she, for her payment, adjudges from him the right of an heritable bond granted by Macaulay skipper in Leith, to John Leslie, and by him disposed to Robertson her debtor, being 1000 merks; whereupon she pursues Macaulay for payment of her debt,

A party assigned an heritable bond which thereafter was adjudged from the assignee, in a process

No 14.
for payment
at the adjudg-
er's instance,
he was not
obliged to
produce the
principal
bond and as-
signation.

who *alleged*, That he was not *in tuto* to pay her, as Robertson's legal assignee by adjudication, because his bond is produced, without which he cannot safely pay, especially seeing it is assigned by Leslie, and none of the mid-couples are *in campo*, and so, if the progress be defective, he may be forced to pay it over again.—*Answered*, I being a singular successor and adjudger, I neither had, nor was obliged to have my debtor Robertson's heritable bond, nor the mid-couples and progress thereof; it was my debtor's evident, and so he could keep it up and abstract it from me with all his art and power; and I am no more bound to produce it than an arrester is, where the debtor's oath, acknowledging the debt in a furthcoming, is sufficient to make him liable, without producing his bond. But, *2do*, I instruct him debtor *scripto*, (which is more than I am bound to do) by a submission and decreet-arbitral, wherein this 1000 merks bond due by Macaulay is expressly mentioned; which furnishes a sufficient document and evidence of the debt against him.—*Replied*, That the decreet-arbitral can never constitute a debt; for, *1mo*, It is suspended, as being *ultra vires compromissi*; *2do*, It can only prove a moveable personal debt against him, which can never be carried by her adjudication; and she has an easy remedy, to take a diligence and recover her author's right thereby.—THE LORDS thought it hard to burden her, and therefore repelled Macaulay's defence; and found the decreet would be a sufficient warrant for his payment; especially seeing there was no other creditor competing with the said Anna Campbell for her sum.

Fol. Dic. v. 2. p. 49. Fountainball, v. 2. p. 353.

1711. *January 25.*

No 15.

An annual-renter's intromissions applied not only for satisfying the bygone annualrents, but even for extinguishing the principal sum for which the infestment of annualrent was granted, although that infestment was then in the person of a singular successor, who had adjudged it.

WILLIAM BAILLIE of Lamington *against* SIR WILLIAM MENZIES of Gladstains.

In the competition of the Creditors of Begbie, betwixt Sir William Menzies, as having right by progress from Alexander Baillie to an infestment of annualrent, and Lamington, as having right to a subsequent apprising; the former pleaded preference upon the priority of his right; which Lamington alleged was extinguished by payment, in so far as he offered to prove by witnesses that Alexander Baillie, Sir William's author, did enter to the total possession of the room of Hillend in the year 1667, and continued therein till the 1680.

Answered for Sir William Menzies; By constant practice in all processes relating to extinction of debts by payment, money rent is proved *scripto vel juramento*, and the victual *prout de jure*; for as our law doth not allow witnesses to be received, where writ is, or ought to be adhibited; so the payment of money, which is subservient to all uses, and the common fungible that supplies the place of every thing prestable, is not to be proved by witnesses, but only by writ or oath of the receiver, since by-standing witnesses may be apt to mistake the occasion and design of the payment.

Replied for Lamington; Though payment of money should *regulariter* be proved by writ or oath, because obligations to pay money are commonly so

constituted ; yet witnesses may be allowed to prove that a creditor entered to a total possession at a certain time, and continued therein so many years ; especially in this case, where Sir William took himself (beyond what his right did carry) to a total possession for the space of 13 years ; and where he thereafter, in evidence that he was paid both of his principal sum and annualrent, did quietly and voluntarily cede his possession to the common debtor ; which is confirmed by Sir Thomas Hope in this Title PROBATION, and by several practicks, as 15th December 1622, Declarator of the Laird of Foulis's escheat, *voce* PROOF ; 16th December 1626, Finlayson *contra* Executors of Lauder, IBIDEM ; 20th January 1627, Ross *contra* Fleming, IBIDEM ; 11th July 1628, Arbuthnot *contra* Lighton, IBIDEM ; 4th February 1671, Wishart *contra* Arthur, No 3. p. 9978. *2do*, There is the same hazard in misapprehending the design of delivering victual, as there is of mistaking the reason of paying money ; for persons who see victual delivered cannot know what was *actum et tractatum* betwixt the giver and receiver, more than in the case of money ; seeing the former, as well as the latter, may be delivered upon many accounts, as in payment, in loan, or for security of performance of some deed ; so that there is a notable difference betwixt proving payment of a sum contained in a bond for extinguishing the right and this case ; for though the witnesses depone that such a sum was delivered *de manu in manum*, it were impossible for them to clear upon what account that was done, as not falling *sub sensu*. But here Lamington doth not so much pretend to prove payment of Sir William Menzies's heritable bond by witnesses, as only to prove his author's entry to the total possession of a certain piece of land, to oblige him to answer for the known rental thereof, which in consequence will extinguish the infeftment of annualrent, unless the possession can be ascribed to another title, or otherways compted for and balanced by the intromitter.

Duplied for Sir William Menzies ; The practick 4th February 1671 is but a single decision, which is over-ruled by subsequent contrary practice. Unless we distinguish betwixt possession within burgh, which can be no other than money rent, and possession in the country, which may be either of money or victual ; *2do*, The reason why money is not probable by witnesses, holds equally in a total, as in a partial possession ; for though the argument from the total possession may hold in the case of an appriser or wadsetter, who have a title to possess ; it cannot be of any weight against an annualrenter, who had no title to possess, and whose possession can never be presumed to exceed his annualrent.

Triplied for Lamington ; He is not arguing from presumptions, but from a clear proof, that Sir William and his authors have uplifted the rents, and therefore must compt for the same ; and it is wild to think, that an intruder without a title should be in a better case than those who by law are authorised to possess.

THE LORDS found probation by witnesses of a total intromission of 12 or 13 years possession of victual or money rent, where there is no intromission by the

No 15.

common debtor or co-creditor, and the intromitter ceding possession to the common debtor, relevant to make the intromitter comptable for the rental both of money and victual.

Thereafter, 20th February 1711, It was *alleged* for Sir William Menzies, That his author's intromission and ceding the possession to the common debtor, cannot be extended to extinguish the principal sum for which the infestment of annualrent was granted, in prejudice of Sir William, a singular successor thereto by adjudication, but only to extinguish the bygone annualrents; the annualrenter having *paratam executionem* by poinding to recover these, but no execution for recovering his principal sum. If latent receipts and discharges, or, which is worse, intromission with rents, should extinguish infestments, *quor-sum* did the act 16th Parl. 1617, appoint renunciations of wadsets and grants of redemption to be null, if not registered. True, an annualrenter having up-lifted his debtors effects to the value of his principal sum, will be excluded *personali objectione* from seeking twice payment; but a successor can only be barred from the principal sum by a registered renunciation, 7th January 1680. M'Lellan *contra* Mushet, No 10. p. 571.; and in the case of Mr Mark Learmonth's Children *contra* William Gordon, (No 13. p. 9989.)

Answered for Lamington, 1mo, No law requires a renunciation of an infestment of annualrent to be registred, and though registrariion were necessary, an infestment of annualrent may be extinguished, without a renunciation, by the creditor's intromission, Wishart *contra* Arthur, No 3. p. 9978, as adjudications and apprisings, though recorded, may be so extinguished. Besides, the intromission here was fully as public a mean of extinction as a registered renunciation. The decision betwixt M'Lellan and Mushet doth not meet; for there the Lords decided *secundum ea quæ proponebantur*; and the other decision betwixt Lermouth and Gordon shall be answered particularly when Sir William doth more particularly demonstrate the decision by its date, and where to be found.

THE LORDS found, That Alexander Baillie the annualrenter's intromissions are not only to be applied for satisfying the annualrents of the principal sum in the infestment, but even for extinguishing the said principal sum, notwithstanding that infestment be now in the person of a singular successor.

Fol. Dic. v. 2. p. 51. Forbes, p. 488.

1713. February 13.

No 16.

Rents applied by the apparent heir, for purchasing an adjudication, become payment and extinction.

The EARL of DALHOUSIE *against* LORD and LADY HAWLEY.

IN the reduction and improbation at the instance of the Earl of Dalhousie against the Lord and Lady Hawley, mentioned 13th November 1712, *voce* REPRESENTATION, the pursuer called for production of an adjudication of the estate of Dalhousie, led at the instance of William Paton merchant in Edinburgh, contained in a bond granted to him by William Earl of Dalhousie,

the Lady Hawley's father, whom the pursuer represents as heir-male, upon a decreet *cognitionis causa*, against George Earl of Dalhousie, as charged to enter heir to the granter of the bond, which adjudication was purchased from William Paton by Earl George's factor, with the rents of the lands adjudged that were *in hæreditate jacente*, and a disposition taken thereof blank in the assignee's name, that continued in the factor's hand till the year 1701, after Earl George's death, when William, last Earl of Dalhousie, brother to Earl George and to the Lady Hawley audited the said factor's accounts, and allowed to him what was paid to William Paton for the disposition, and filled up his own name in the blank. The Lady Hawley claimed right to this adjudication, as served heir of line to Earl William her brother.

The pursuer insisted to reduce the adjudication upon this ground, That the creditor adjudger having got payment out of the very subject adjudged, his debt and diligence became extinct.

Answered for the defenders, *1mo*, She the Lady Hawley had a bond or disposition of tailzie from her brother Earl William, last deceased; whereby, failing heirs of his body, he is bound to resign the estate in favour of her *nominatim*, which plainly excludes the pursuer's title. In regard the granter having been more as three years in possession, the pursuer, who past him by, is liable to pay and fulfil his debts and deeds in the terms of the 24th act, Parl. 1695; consequently cannot quarrel the right standing in the Lady's person; now *frustra petit qui mox est restitutus*; and *lites non sunt multiplicandæ*. *2do*, No man hath right to declare an adjudication extinct, but he that hath right to the reversion, who either must be a creditor, or heir to the reverser; and the pursuer hath none of these capacities: He doth not pretend to be a creditor, nor is he heir to the reverser; for since Earls George and William died in the state of apparenacy, without entering heirs in the estate to their father the debtor, upon whose bond the adjudication was led; the acquiring the adjudication for the behoof of Earl George in the year 1691, made no confusion or consolidation of the reversion with the property, and could not extinguish it in his person; nor doth it alter the case, that the adjudication was acquired with the rents *in hæreditate jacente*; for these being uplifted by Earl George's factor, and become his property as apparent heir before acquisition of the adjudication, the factor's applying the same to purchase the adjudication, could no more extinguish it than if payment had been made out of Earl George's other effects; because, albeit an apparent heir's intromission with the rents of his predecessor's estate might infer a behaviour, and subject him to the payment of his predecessor's debt; yet his applying the rents to acquire an adjudication upon the estate, could not hinder that acquisition to subsist in his person a good title to possess the estate by, as if he had been a stranger, to exclude a remoter apparent heir; though it did not hinder creditors to redeem within the legal.

Replied for the pursuer, *1mo*, He hath good interest to reduce and extinguish the adjudication, because served heir to Earl William his cousin, the granter of the bond on which it was led, and so personally liable for the debt; nay fur-

No 16. ther, since the pursuer stands infeft in the estate adjudged, he hath good title to reduce all real rights affecting the same, whatever force the tailzie may have as a personal obligation against him. 2do, An apparent heir hath no property in the rents, but only a faculty to continue his predecessor's possession, and intromit when no better right competes. Besides, Earl George having renounced to be heir in favour of Paton, who adjudged *hereditatem jacentem* in satisfaction of his debt, the estate and rents of it belonged to him till he was paid, and simply if not paid within the legal; and Paton being paid by the factor out of these rents, the adjudication became extinct. The disposition of the adjudication was in that case no more but an instruction and voucher of the payment whereupon extinction followed *ipso jure*; or like an assignation to the debtor of his own bond; and Earl George being *passive* liable to Paton the creditor, by the intromission with the rents as apparent heir, payment of the debt by the Earl's factor did extinguish it *ipso facto*.

THE LORDS found, That the pursuer being heir to the granter of the bond, on which the adjudication was led, and served in special to him in the estate adjudged, hath good interest to extinguish the adjudication by payment, notwithstanding of the disposition to the defender by her brother, the last Earl William, without prejudice to her using the said disposition or any other right, as accords; and found, That the adjudication being led on a decree *cognitionis causa*, Earl George's factor's purchasing and retiring it by the rents of the lands adjudged, which were *in hereditate jacente*, and Earl William's admitting and excepting that article in the said factor's accounts, to exoner him of his intromissions with these rents, is relevant to extinguish the adjudication by payment.

Fol. Dic. v. 2. p. 49. Forbes, p. 666.

1713. December 10.

JAMES HALYBURTON of Fodderance, against Mr JAMES COOK of Ardlaw.

No 17.
Circumstances inferring payment.

JAMES HALYBURTON of Fodderance sold a piece of land to Mr James Cook, who, 1st February 1707, granted bond to Fodderance for 33,500 merks as the price, with this provision, that whatever sums Mr Cook had advanced, either to him, conform to his bills, bonds, or receipts, or paid to his creditors by his order or warrant, should be allowed in part payment. Mr Cook being charged upon this bond, suspended; and, at discussing of this suspension, had paid not only 7,500 merks to Fodderance himself, but also to Turnbull of Smiddiehill, his creditor, L. 1000 secured by an heritable bond and infeftment, and L. 220 by another heritable bond, and to one Jack, another creditor, 1000 merks; of all which, the suspender craved allowance, and produced discharges to vouch the payments.

Alleged for the charger; The discharges granted by Smiddiehill and Jack bear receipt of the money from Fodderance himself.

Answered for the suspender; The discharges being in hand, presume that the payments were made by him, and he fortified this presumption by a probation of witnesses, clearing that he had given his own bonds and bills in lieu of the discharges.

Replied for the charger; The discharges bearing the money received from him by Turnbull and Jack, cannot be redargued but by his writ or oath, conform to the Lords interlocutor, 26th July 1711 (see PRESUMPTION); because, *imo*, Writ is not regularly to be taken away by witnesses, which general rule in this case is fortified by the 25th act of the Parliament 1696, appointing declarators of trust to be vouched by writ or oath of party; and, by a special clause in the bond charged on, that the suspender should have allowance only of debts paid to the charger's creditors by his order or warrant, which the suspender hath not to justify his pretended payments to Turnbull and Jack; *2do*, The sums contained in these discharges ought not to be allowed as separate articles of payments from the other receipt of 7,500 merks granted by the charger to the suspender in a few days after; for, though a posterior greater receipt might not be presumed to include a prior smaller receipt still extant in the hands of the payer, yet here, where the instructions of the anterior payments are conceived simply and directly in the charger's own favours, the suspender can never be heard to found thereon as made by himself, there being nothing more ordinary than for one man to discharge another man's money and take receipt thereon in the other's name; which, though in the payer's hand, would never be a ground of action or exception to him against the person in whose name it is conceived; which is conform to the decisions betwixt Gordon of Troquhen and McGhie of Balmagie, 27th November 1711, *voce* PRESUMPTION, and betwixt Nisbet of Dirleton and Johnston, 26th July 1711, *IBIDEM*.

Duplied for the suspenders; Though writ be not regularly taken away by witnesses, it is elided in some cases, not only by witnesses, but by presumption, arising from the tenor of receipts: In so far as, *imo*, He being debtor to Fodderance for the price of the lands, and the payments made to the creditors by heritable bonds, he, Mr Cook, had a proper interest to disburden his purchase; *2do*, Had the money been paid by Fodderance, or included in the general discharge of 7,500 merks, it cannot be thought that the receipts would have remained in the suspender's hands, but the charger would certainly have gotten them up; *3tio*, The suspender hath also proved, by witnesses, that he actually paid the money, or gave security to the original creditors in lieu of the discharges. Now, albeit the simple having of a writ will not infer that the haver paid the money contrary to the tenor thereof; yet a person, obliged or concerned to pay another's debt, having the instructions retired, is presumed to have paid it. Trust, again, in a general sense, might be extended to all cases where there is any trust as to obligations betwixt tutors and pupils, constituents and factors, merchants and correspondents, clients and their doers. But, it cannot be thought, that here the Parliament 1696, making a correctory sta-

No 17. tute, (which is to be strictly interpreted) meant to comprehend such cases. It concerns only deeds of trusts made use of to found action of declarator of trust, and not the present case, where the suspender is defending himself *via exceptionis*. The clause in the bond for allowing only debts paid by Fodderance's warrant, imports only that he may object, if he can, against any debts paid without his order, that they are not good debts. Besides, the probation adduced, clears that the payments were made by his order. The practise of Troquhen and Balmagie doth not meet; for the taking one receipt, bearing simply from himself and a second bearing partly from himself, partly from another, and the *correus* not having any of the other's effects are circumstantiate differences; besides that exception is more favourable than action. Though the other case betwixt Dirleton and Johnston, is as little to the purpose, because there the payment was officious without any warrant, and it doth not appear that the tenant was debtor to the master in the equivalent of the sums paid. Nor were the debts paid, cesses or minister's stipend, which affected the subject of the tenant's possession, as the debts paid by the suspender did his purchase.

THE LORDS found that the discharges by Smiddiehill and Jack, produced by Mr Cook the suspender, who was debtor to the charger, are not in the case of the 25th act of the Parliament 1696, anent blank bonds and trusts; and found that those receipts are not presumed to have been included in the general discharge of 7,500 merks, and therefore allowed the sums contained in these receipts, except the charger offers to prove by the suspender's oath, that they were therein included. THE LORDS also found it proved, that, notwithstanding the narrative of the controverted discharges, bearing the payments to be made by Fodderance's money, yet the payment was made out of the remaining price due by Cook to Fodderance, after purchasing the lands from him, unless Fodderance would redargue the same by Cook's oath.—See Haliburton against Cook, *voce* PRESUMPTION.

Forbes, MS. p. 10.

1714. July 16.

SIR WILLIAM MENZIES of Gladstones, *against* MARION JOHNSTON, Relict of Captain Alexander Wood.

No 18.

Circumstances inferring payment.

SIR WILLIAM MENZIES pursued Marion Johnston upon the passive titles, as representing Alexander Wood her husband, with whom the pursuer and others were partners in a tack of the excise, from 1st March 1699 till 1st May 1701, for payment of L. 501 : 9 : 4d. Sterling as the Captain's share for L. 2005 : 17 : 4d. advanced by the pursuer to the general receiver, in name of their tack-duty, over and above the whole produce of the tack, which amounted only to the sum of L. 48,994 : 2 : 8d; whereas, the payments made by him to the receiver extended to L. 51,000 Sterling. For instructing his libel, he produced a stated

account of the produce of the excise, subscribed by him and Captain Wood, and two discharges under the hand of Robert Rutherford general receiver, whereof one bore him to have received from the pursuer L. 25,000 Sterling, to account of his and Captain Wood's excise duty for the first year, and discharges them *pro tanto*; and the other bore him to have received from the pursuer and sub-tacksmen of the excise and others, the sum of L. 28,000, to account of the pursuer's and Captain Wood's second year's tack-duty of the excise, and discharged them *pro tanto*; and the said Robert Rutherford and Colin Alison, collectors of the excise, being examined upon oath, the former deponed, that the payment of the L. 26,000 was made to him by Colin Alison, collector of excise, and the sub-tacksmen, but he did not remember that he got any part thereof from Captain Wood; and Mr Alison deponed, that he, by order from the pursuer and Captain Wood, delivered the money received by his collection to Robert Rutherford, and that no part thereof was Captain Wood's proper money.

Answered for the defender; It cannot be supposed that the pursuer advanced any of his own money to pay this debt; *1mo*, Because the sum was considerable, which no man of ordinary conduct would have advanced out of his own money upon the account of the co-partnery, without any antecedent order from his partners; *2do*, Where one of two co-obligants pays the debt, he takes always an assignation, at least such a declaration from the creditor as might clear his relief against the other, which is altogether omitted by the pursuer; *3tio*, What could have moved the pursuer, had he made any payment out of his own money, to take the discharge as ample in favours of his partners as of himself; *4to*, It is not usual for a *correus debendi* to be precipitant in advancing his money to satisfy debts wherein others are bound with him before distress, and here was no previous distress; *5to*, Albeit Captain Wood lived and conversed daily with the pursuer for three years, in good credit and circumstances, after the date of the said discharges, yet the pursuer made no demand upon him for this great sum, nor asked any security for his proportion thereof; *6to*, The oaths of Rutherford and Alison evince that the money was paid in to Rutherford by other hands than the pursuer; *7mo*, The account the pursuer founds on for instructing the produce of the tack, is not probative, because it was made up, not conform to what was the true amount thereof, but with a particular view to be given in to the Parliament when Sir William was insisted against for payment of the tack duty, and Captain Wood and he were using their endeavours for procuring an abatement; in which case, it was their interest to make the produce of their tack appear as low as possible. But if the pursuer would produce the private books of co-partnery, which has been so frequently desired on the part of the defender, the produce of their tack will amount to a greater extent.

Replied for the pursuer; That the claim was directly founded in the tenor of the receipts, and his having them in his hand; all which is supported by the

No 18. two depositions aforesaid, which disown any part of the money paid into Rutherford to have been Captain Wood's proper money; consequently, it is incumbent upon the defender to shew that any part of the money was delivered to the pursuer by Captain Wood. It imports not, that the receipts discharge both Sir William Menzies and Captain Wood; since they being partners, payment by either did liberate both, and consequently both fell to be discharged; but that can never hinder action of recourse at his instance who made the payment. This case seems much of the same kind with that decided betwixt Sir John Swinton and the Representatives of Provost Brown, (See APPENDIX), where the Lords found that Sir John Swinton having paid money, for which he and Langton were jointly liable, though the receipts did discharge both Langton and him, and one of them bore expressly receipt of the money from Sir John in name of Langton, Sir John had his recourse, unless Langton could instruct that he delivered to Sir John that money which Sir John had paid, and taken receipts for. It is true, a great part of what was paid, was paid out of the produce of the tack, and so far as that produce goes, the pursuer claims no recourse; but the payments having exceeded the profits of the tack, in so far his action still stands good. And the subscribed accompt of the produce of the tack is most probative; seeing whatever was the occasion of stating it, the pursuer abides by it, as a true and just accompt.

THE LORDS found the documents produced not relevant to oblige the defender to make up the balance pursued for by Sir William Menzies, which he alleged was paid by him to the government more than the excise, which was the subject of the co-partnery.

Forbes, MS, p. 86.

No 19.

The Lords refused to allow a minor's estate to be adjudged upon a debt purchased in by the curator, and taken in an assignee's name *ante redditas rationes*, altho' the assignee had, for the said assignation, discharged an equivalent debt owing to him by the curator.

1714. July 20.

WALTER BREBNER, Writer in Largo against ANNA COOK and JAMES MELVILLE, Merchant in Pittenweem, Her Husband.

CHRISTIAN and Anna Cooks, daughters to the deceased James Cook in Pittenweem, being daughters to Mr Thomas Binning at Dalmarnock, in the sum of 1100 merks principal, and several bygone annualrents contained in a decret obtained at his instance against them as heirs portioners to their father; Dr Arnot, who married the eldest daughter Christian, was chosen curator to Anna Cook, acquired assignation to the said debt in name of Walter Brebner, his own creditor, upon Brebner's discharging the debt owing by him. Brebner pursued an adjudication against Anna Cook and her husband for the equal half of the sum,

Answered for the defender; That Dr Arnot, her curator, having transacted and paid the debt, and never, to this day, cleared his curatory accompts, he is presumed to have paid the one-half thereof for his pupil with her own means,

which he is still presumed to have in his own hands *ante redditas rationes* ; and, as he could have no action against the defender for payment of this debt, neither can Brebner, in whose name he took the assignation, to evite the exception competent against himself, *Nam quod non licet directe, non licet per ambages* ; if it were otherwise, the privilege competent to minors for preventing encroachments upon their estates by their tutors and curators, might be easily eluded by their purchasing in the persons of trustees, rights to the minor's debts, and making them subsist as grounds of eviction of the minor's estate, though purged by his own means, and disappointing the minors of the benefit of easements got from the creditors.

Replied for the pursuer ; Had the Doctor paid the debt, and taken a blank assignation, or taken an obligation from Binning to assign in favour of any person he should name, the defender might have had some pretence to say, that she could not be convened *ante redditas rationes* ; but there is no place for it here, where the debt was in the pursuer's name, from the beginning delivered to himself, and never in the Doctor's person. Our law, which so far protects an onerous assignee, as not to allow the oath of the cedent to militate against him, can never allow a personal exception against a third party, who was neither author nor cedent to the pursuer, to militate against him ; yea, a bond taken by a debtor in his creditor's name, was found not to be affected by arrestment laid on for the procurer's debt, even while it was in his hand not delivered to the person whose name was in the bond, 12th July 1677, *Bain contra M'Millan, voce PRESUMPTION*. Nor can the assignation to the pursuer be understood to elude the law ; seeing the Doctor might lawfully pay his own debt, either by money in specie, or in case the creditor did not desire that, by procuring an equivalent right to him, and *nemini fraudem facit qui jure suo utitur*.

THE LORDS found there could be no adjudication at the pursuer's instance, as having right from Dr Arnot, the defender's curator, *ante redditas rationes*.

Fol. Dic. v. 2. p. 51. Forbes, MS. p. 92.

1714. July 22.

VISCOUNT of GARNOCK and His CURATORS, *against* JAMES WILSON, late Factor to the Deceased Viscount of Garnock.

No 20.

Effect of vouchers in the hands of a factor.

IN the compt and reckoning at the instance of the Viscount of Garnock, against James Wilson, as chamberlain and factor to the late Viscount, the defender craved, *imo*, Allowance in his accompts of several bonds and bills due by the Viscount, and now produced by the defender, without any discharge thereof by the creditors bearing receipt of the money from him.

Answered for the pursuer ; The defender's simple having of the bonds and bills is no proof *per se*, unless he instruct that he actually paid the money ; be-

No 20. cause a factor's custody of his constituent's bonds is all one as if they had been in the constituent's hands. Nor does the simple having of a writ give any interest therein to any person, unless it be granted to, or some ways conveyed to the haver; for otherwise, the party in whose favour it is conceived, might recover it by action out of the haver's hand. It is true, that such action would not lie against a factor, for recovering out of his hand, a bond granted by his constituent for this only reason, that a factor's custody is understood the constituent's custody; and a writ in the factor's hand is, in the interpretation of law, *instrumentum penes debitorem*. And as law presumes thus against the creditor, so it presumes also against the factor, that the constituent's bonds lying by him, have been paid and retired by the constituent himself, unless the contrary be instructed. Seeing law requires diligence and exactness in factors, any obscurity arising from their fault, should be interpreted against them; and here the factor has it in his power to put this question out of doubt, by taking receipts from the creditors to him in name of his master, which he hath neglected to do.

Replied for the defender; The retired bonds and bills being in the compters own hands, who was under the character of chamberlain, it is presumed he retired them as chamberlain; because it is usual for such to pay and retire their constituent's obligations without taking formal receipts, especially where these obligations are not recorded, and the haver of the principal writ is presumed the payer. Were it a menial servant, having no other trust, who produces such retired bonds, it might be said, that he was only the hand that transmitted the money from the Viscount; but, where one has a written factory for uplifting the constituent's rents and effects, it is presumed that payment has been made by him as such; and chamberlains use to keep by them the retired instructions of their master's debts, till computing, as sufficient vouchers of their discharge; for a chamberlain may have access to tacks, rentals, and such like documents concerning his trust of uplifting the subject standing out; but he is not presumed to have access to other writs that do not concern his trust. Nor are chamberlains to be considered as tutors and curators, or others having universal mandates from persons absent, whose administration leads them to the charter-chest.

THE LORDS found that the factor's simple having of bonds and bills does not presume that he paid them.

2do, The compters discharged himself with the advances of money to my Lord himself from time to time, for which he hath no formal receipt, but only a book of memory which his Lordship kept, wherein he set down, with his own hand, the several payments, and other loose pieces of paper within the leaves of that book, written with his Lordship's own hand, which the compters contended was a sufficient proof for these articles; because, 1mo, They exactly quadrate with the accompt given in; 2do, My Lord needing frequent advance, it was impracticable to have formal receipts; 3tio, What one sets down in his

day-book or book of memory, proves against himself, though not for him ; for it is not to be presumed, that he would set down, with his own hand, what he did not receive, and the loose notes being found in his book, are of the same force.

Answered for the pursuer ; An accompt-book is not *per se* sufficient without being otherwise adminiculated, as was decided 20th Jan. 1631, Ogle's Creditors *contra* Brown, *voce* PROOF ; far less can the accompt-book be sustained here, where the defender produceth a great many receipts under my Lord's hand, and craves allowance ; both of these receipts and the sums in the accompt-book. For it is probable, the payments stated in the accompt-book were included in the receipts, where these are posterior ; besides, the book and schedules could at most be sustained, only in so far as they are proved to be my Lord's holograph, and bear the receipt of money from the defender.

THE LORDS sustained the book, with the scrolls and loose papers within the leaves thereof, mentioning or acknowledging payments or disbursements made by the factor ; the factor always giving his oath in supplement thereupon.

Forbes, MS. p. 96.

1714. December 9.

Mr JAMES BAILLY, Advocate *against* WILLIAM BAILLY of Lamington.

Mr JAMES BAILLY, as assignee by his father, pursues Lamington as representing Sir William Bailly of Lamington, for certain sums contained in two heritable bonds.

The defender *alleged* ; The pursuer's father had been his curator, and *præsumitur intus habere ante redditas rationes*.

It was *answered* ; By the 9th act Parl. 1696, all actions for tutors and curators accompts prescribe in ten years, and such as were prior to the act prescribe in ten years after the date thereof.

It was *replied* ; The defender pretends not to call the pursuer to an account as representing one of his curators, because of the fact of prescription ; but nevertheless does allege, that the presumption that the curator *intus habet* does take place for extinguishing the pursuer's claim against the defender. And it many times happens, that, when an action is temporal, the exception may be perpetual, as by the civil law *actio doli* doth prescribe in two years ; but the exception was perpetual, and compensations are often sustained on holograph writs or tickets after twenty years ; because the compensation operates an extinction *ipso jure* from the time of the concurrence : Just so the pursuer's father, being the defender's curator and his creditor, his intromissions were imputable in payment of the debt due to him ; and if it were not so, the act might become a snare ; for tutors and curators do frequently take assignations to the pupil's or minor's debts, either as not having of the pupil's money in their hand, or pre-

No 21.

The decennial prescription of tutor and curator accompts, does not elide the exception that the tutor or curator *intus habuit*.

No 21. tending so ; and if all these debts, which are but articles of discharge, should stand out against the minor, and yet prescription take place, that act would be a great prejudice and a snare to minors, and would leave them open to articles of discharge as debt, and yet disable them to lay a charge against their tutors.

It was *duplicated* ; If such exceptions were sustained, the act would in a great measure be eluded ; for in this case, and many others, the curator was creditor before he was curator ; so that there is no presumption that the debt was originally purchased by the means of the minor : And the law presumes, that all the curator's intromissions were applied for the behoof of the minor after the decennial prescription ; so that the creditor who was curator has the same right and title to claim his money, as if no curatory had intervened ; and it were very hard, if, notwithstanding of the act of Parliament, he must enter into count and reckoning before he can demand his clear liquid debt ; for the act of prescription excludes all question on that subject, either by action or exception, which is the same thing ; for *reus excipiendo fit actor* ; and the said act bears, that the tutors and curators shall be as fully exonerated, as if the pupils or minors had after majority granted ample discharges.

It was *triplicated* ; That the whole tenor of the act of Parliament relates only to actions at the pupil's instance against the tutors and curators, or the contrary actions at their instance against him, but not to exceptions ; for it is to this effect, that all actions of count and reckoning shall prescribe in ten years, &c and the said tutors and curators shall be as fully exonerated, as if the said pupils and minors had discharged the same ; which words, ' the same,' are to be understood, the same actions ; but that can never intitle a tutor or curator to pursue the minor for such debts as law presumed to be satisfied and paid before the prescription run ; for that presumption of *intus habet* continues still unprescribed ; and generally exceptions are perpetual : Neither is there any difference whether the debt was due to the curator before his office, or a right to a debt acquired by a curator during his office ; because the presumption *quod intus habet*, militates equally in both cases ; for the curator's first intromission is imputable in payment of anterior debts ; and so the presumption taking once place, continues still. It is true, the curator may reply and say, that he will count for eliding that presumption, and make appear, that the pupil's whole effects are otherwise applied for his behoof ; in which case, if the curators should so far succumb, that a balance ten times greater than the sum acclaimed were found in his hand, the prescription takes place to exoner him amply for the whole balance, except in as far as it compenses the debt acclaimed.

" THE LORDS found, That the act of Parliament did not take place to exclude the exception, upon the presumption that the curator *intus habuit*."

Fol. Dic. v. 2. p. 50. Dalrymple, No 124. p. 173.

. Bruce reports the same case :

No 21.

THE deceased Sir William Bailly of Lamington being debtor to Mr William Bailly, Advocate, the now Lamington made some partial payments to Mr William; and Mr James Bailly, as having right from his father to these debts, insists now against him on the passive titles.

Answered for the defender; That Mr William, the pursuer's father, having been curator to him, no action could be sustained at the pursuer's instance, for any debt of Lamington's predecessors, *ante redditas rationes*, since the pursuer could be in no better case than his father and author.

Replied for the pursuer; That the curators accounts were prescribed in the terms of the act 1696; and, therefore, the exception no more to be regarded, than if the pursuer's father had been actually discharged of his accounts, conform to the said act.

Duplied for the defender; *1mo*, That, though the action for count and reckoning be prescribed, yet the exception was still entire, by the rule in law, *temporaria ad agendum, sunt perpetua ad excipiendum*; *2do*, It was presumed, that the creditor having been curator, *intus habuit*, whereby the debt became extinct, *per compensationem*; which takes place *ipso jure*, and is equivalent to payment. And as to the prescription being equivalent to a discharge, even an ample discharge of the *actio tutelæ directa*, in favour of Mr William Bailly, could never have screened him from the extinction of this debt; for law would never presume that the discharge was granted gratuitously, but from a consciousness, that the curator had applied his intromissions in the way he ought to do: And in the present case, law obliged him not only to intromit, but to apply his intromissions to the extinction of his own debt; and since he was obliged to apply his intromissions in that manner, law will likewise presume he made the application duly.

Triplied for the pursuer, That if this were sustained, a curator would be in a worse case after the prescription is run than before: For the contrary action being also by that act prescribed, the curator can never bring the minor to account, and thereby the prescription shall cut off the curator from all debts due by the minor's predecessors; *2do*, There is no obligation on a curator to pay himself, only he has a faculty to do it if he pleases, as is plain from *L. 9. § 5. D. De Administratione Tutorum*.

"THE LORDS sustained the defence on the presumption that the pursuer *intus habet*, his father having been curator to the defender; and found the act of Parliament takes not place."

Act. M'Doual.

Alt. Narmyth.

Clerk, Gibson.

Bruce, vol. 1. No. 16. p. 21.

- No 21. * * A similar decision was pronounced, 17th June 1737, Scot of Ancrum against Douglas of Glenbervie.—See APPENDIX.—In this case it was yielded, that the defence could not stand upon the footing of compensation, because the defender's claim upon his curator's intromission was sopped by the decennial prescription.

1734. December 5.

BRYMER against GRAHAM.

No 22.

A REAL creditor upon a bankrupt estate, who was also cautioner for the factor, having conveyed his debt to a creditor of his own for his security and payment; the question arose, If the assignee could draw this debt out of the bankrupt estate or price thereof, without being chargeable for the balance due by the factor, who was now become bankrupt, as well as his cautioner the cedent. In this case there could be no place for compensation; for, *esto* the balance due by the factor had been liquid, the cautioner was creditor upon the estate, but had no claim against the co-creditors, neither was he debtor to them for the factor's intromissions, but to the Court of Session; neither could payment or extinction be pleaded, because a factor has no power to apply his intromissions towards payment of his own debt, and far less has his cautioner power to apply the factor's intromissions; the LORDS therefore found, That the onerous assignee was not liable to account for the factor's intromissions, and repelled the objection pleaded against him upon that head.—In a former case, the LORDS had sustained the objection against the onerous assignee, 3d January 1730, Oliphant against Morisons.—See APPENDIX.

Fol. Dic. v. 2. p. 51.

1736. January 31. LEGATEES of JOHN CALDWALL against THOMAS CALDWALL.

No 23.

THOUGH an executor may exhaust the testament by debts due to himself, without necessity of doing diligence, a legacy left to him is upon a different footing, which he is not allowed to take credit for, in exclusion of the other legatees; for seeing the legacies are all expressed in the testament, they must come in *pari passu*, and he is not allowed to pay *primo venienti*, as in the case of debts. Yet where a legacy of L. 20 was left to an executor to buy a suit of mournings, he was allowed to take credit for what part of the sum he had *de facto* employed that way, as being a sum to be laid out *ante omnia* by the express orders of the defunct.

Fol. Dic. v. 2. p. 50. C. Home.

* * This case is No 23. p. 8066. voce LEGACY.

1744. November 30.

MACWHIRRICH and CUTHBERT her Husband *against* MACKAY.

WILLIAM MACWHIRRICH, merchant in Inverness, having died in the year 1714, leaving John a son, and three daughters; Elspeth Fowler the relict intromitted with his whole effects, carried on the business, and, in a short time, intermarried with William Mackay, who, 1725, was confirmed executor-creditor to the defunct.

William Macwhirrich having, before his death, made a purchase of certain tenements, the full price whereof he had not paid; William Mackay paid up the same, and obtained from the seller a disposition, 5th November 1720, to John Macwhirrich, containing this clause, 'That William Mackay had, in name, and on the account of John Macwhirrich, eldest lawful son and heir served to the deceased William Macwhirrich, made payment of L. 1000 Scots as the remaining part of the price of the said acres, tenements, and shop, with the annualrent thereof from Whitsunday 1714, amounting to L. 1325 Scots.'

John Macwhirrich on his majority cleared with William Mackay, and for the balance which came out in his favour, gave him an heritable bond for L. 300 Sterling, and afterwards executed a testament, wherein he named him and Elspeth Fowler his executors and universal legatars.

John died, and two of his sisters made up their titles to their brother's estate, and conveyed their share of it to William Mackay; but Elspeth, one of them, with concurrence of Cuthbert her husband, raised a process against him and his wife, to account for the executry, and a reduction of the heritable bond on the head of death-bed, in which the bond was sustained only in so far as it was onerous; and this point being fixt, the Lord Ordinary, 18th July 1744, 'Having considered that William Mackay the defender, when he paid the L. 1000 in question, had William Macwhirrich's executry in his hands; and he having already got credit for that sum, in accounting for the said executry, found that he ought not to have stated that as a debt against John Macwhirrich the heir, or taken security therefor from him by the heritable bond now insisted on, and that he could not get a second payment thereof out of John's heritable subjects.'

Against this interlocutor Mr Mackay reclaimed, and prayed to have it found, that the heritable bond was a subsisting debt *quoad* the L. 1325, and that he was entitled to state it accordingly; for these reasons, that the seller was a lawful creditor, and had an action against John Macwhirrich, and might chuse to seek his money either from him, or the executors; and if the heir had, instead of payment, granted bond for the sum, it would have been an onerous deed: That in the present case, the petitioner interposed, and paid his own money, to prevent John from being distressed, and thereby came in the seller's place, and got the bond for what he had advanced: That the specialties mentioned in the

No 24.

An executor paying a debt, and stating the same to the heir, from whom he got heritable security, and becoming executor to him, it was found, he could not claim the debt out of his heritable subjects, having had the original debtor's executry in his hands when he paid.

An heritable bond on death-bed being reduced, except in so far as it should be supported by anterior debts, which were transacted at granting, and one of these debts being deducted as *aliunde* paid, it was found, the creditor could not have recourse to other grounds of debt to make up the sum deducted.

No 24. interlocutor did not vary the case; for the payment was out of William Mackay's own money, on account of John Macwhirrich, the creditor not being seeking the executors. Suppose John being pursued, had borrowed it from a third person, a debtor of the executry, he could not have defended himself against the bond, by alleging on the debt to the executry, which fund must at last pay it; but must have paid, and been left to operate his relief.

To the allegation, that he had already got credit for this sum, in accounting for William's executry, and therefore could not a second time get payment out of John's heritable subjects, he *answered*; It was true, that in the account of executry, the accountant employed had stated this as an article of discharge; but he pleaded that the article ought to be struck out, because the sum was advanced out of his own money, for the behoof of John Macwhirrich, and he admitted he had no claim out of the executry, having got security from his debtor.

It was true, that by the accident of his being named executor to John, he had, in his right, a claim upon William's executry, out of which the heir ought to be relieved of the moveable debt paid by him; but this could never be called double payment, since what he draws from John's heritage is as his onerous creditor; and his claim upon William's executry is as executor to John: Nor can the pursuers complain, who pay this debt but once, as they would have been bound to do, if John had made the payment with his own money.

"THE LORDS refused the petition."

1745. *July 9.*—WILLIAM MACKAY, merchant in Inverness, married the relict of William Macwhirrich, merchant there, who had intromitted with her husband's whole effects; and thereupon he obtained himself confirmed executor-creditor to him.

William Mackay paid a debt of L. 1000 Scots of William Macwhirrich's, and there were some other accounts between John the defunct's son and heir and him, which were transacted; and John gave him an heritable bond for L. 300 Sterling.

In a dispute which happened between William Mackay and John Macwhirrich's heir, the bond was reduced on the head of death-bed, except in so far as the creditor should support it, by shewing anterior grounds of debt; and he having insisted for that purpose on the debt of L. 1000 of old William Macwhirrich's paid by him, it was found, that he could not reckon upon it, as it was a charge upon William's executry, which he had then had long in his hands; and therefore ought not to have charged it on John the heir, especially considering he had since that time got credit for it in accounting for the executry.

Pleaded now for William Mackay; That though it was found he could not state this L. 1000, yet he could support the heritable bond by other debts of John due to him at the granting thereof exceeding the extent.

Pleaded for the Heirs of John Macwhirrich ; All the claims William Mackay could pretend against him, including this L. 1000, were transacted for L. 300, and he has already got payment thereof, by being allowed it in the account of William Macwhirrich's executry.

The shape of the process being a count and reckoning, in which the accountant had made a report, disallowing of this L. 1000 stated by William Mackay ;

THE LORDS, 28th June, approved of the report made by the accountant, in respect that William Mackay had credit for the L. 1000 out of the executry of William Macwhirrich : And this day adhered.

Reporter, *Lord Murkle.* Act. *A. Macdowal.* Alt. *Boswell.* Clerk, *Forbes.*

D. Falconer, vol. 1. p. 14. and 114.

1744. December 21. The CREDITORS of M'DOWAL *against* M'DOWAL.

AN executor nominate confirming after six months, and while no creditor had done any diligence, was, in the action against him at the instance of the defunct's creditors, found " to have right to retain for payment of what debts were due to himself, whether they had been originally due to him, or acquired by him before the confirmation."

And so far the Court was pretty unanimous, in respect that a confirmation, whether as executor nominate or *qua* nearest of kin, is considered partly as an office, partly as a step of diligence for recovering payment of whatever may be due to the executor himself before confirmation : For, as to the difficulty urged by some, that, at that rate, any executor nominate, or nearest of kin, intending to confirm, might prefer what creditors he pleased, by picking up their debts before the confirmation ; the answer was, That every creditor has a remedy by confirming himself within the six months.

But there was another point in this cause which was of more dubiety, Whether the executor should also have preference for his relief of debts, wherein he stood cautioner for the defunct, and which were yet standing out unpaid ? Several of the Lords were of opinion, That he ought not to have any preference for such relief, agreeable to the decision, Feb. 2. 1628, recited in the case, *Adie contra Gray*, No 193. p. 9866. ; and gave this reason for the difference, That where the debt is in his person, he may pay himself without a decree, which he cannot take against himself, and the law does not require the circuit of an assignation ; but that does not apply to the case where he is only creditor in relief.

It was notwithstanding found by the plurality, That the executor was in this case also preferable for his relief : As confirmation was the proper method for securing his relief, so the law was considered not to stand on so narrow a bot-

No 25.

An executor-testamentary is preferable before all the creditors, for payment of debts where he is cautioner, and also for payment of debts due to himself.

No 25.

tom as this, that the executor, where the debt was in his person might pay himself; but on this more general one, that such confirmations was not merely offices, but also steps of diligence for obtaining payment, and for the same reason for obtaining relief. It would perhaps not have been amiss, to have at least added a quality, The executor finding caution to pay those debts, (as an arrestor for relief was obliged to do; *Vide* December 14. 1743, Lord Holyroodhouse, No 24. p. 695. ;) lest the creditors might thereafter draw payment thereof out of the executry, from which they are not precluded by the preference now sustained to the cautioner; but of this nothing was said.

A third question also occurred in this case, viz. What should be the import of a clause in the testament, whereby the executor was nominated, with this express quality, and under the condition, 'That he should pay all the defunct's just and lawful debts?' And the LORDS without hesitation found, "That it imported no more than what *inerat de jure*."

Fol. Dic. v. 2. p. 54. Kilkerran, (EXECUTOR.) No 9. p. 175.

* * * This case is also reported by Lord Kames:

PATRICK M'DOWAL of Crichen, in April 1734, executed a testament in favour of Charles his son, appointing him sole executor and universal legatee, with the burden of his just and lawful debts. Patrick M'Dowal died in May thereafter, in good circumstances, so far as appeared. The six months were allowed to elapse without diligence; after which, Charles the son confirmed executor-testamentar; and upon that title had an universal intromission. It afterwards appearing that Patrick the father had died utterly insolvent, Charles who was bound cautioner with his father in many debts claimed credit for such of these debts as he had paid, some before confirmation, and some after. He also claimed preference for such of these debts as were yet standing out, and also for other debts which he had paid voluntarily, and taken assignments to the same before confirmation.

In support of his claim, it was *pleaded*, That the law is not so whimsical as to make it necessary, that an executor who has an universal title of intromission, should take a decree against himself, or assign his debt to a trustee in order to take a decree. It considers the general confirmation to be virtually a confirmation *qua* executor-creditor. Nor is any injustice thereby done to the creditors; seeing a bare citation within six months will bring them in *pari passu* with the executor confirmed. The authority of Lord Stair was also urged, B. 3. T. 8. § 73, in these words: 'The executry is likewise exhausted by debts due to the executor himself without any process, but merely by exception of compensation, though he be not confirmed executor *qua* creditor, but executor otherwise.' And again § 76, 'For instructing exhausted, executors may found upon payment of the privileged debts at any time, upon the ex-

* pence of confirmation, upon debts due to themselves before confirmation, but not upon debts assigned to them after confirmation.'

In answer to this claim the Creditors reasoned thus: The powers of an executor are by no means so extensive as those of a tutor. A tutor as to administration has the full powers of a proprietor; he may pay the debts in what order he thinks proper; he may prefer one creditor before another, as the deceased himself might have done. An executor has no such powers; his business is to gather in the effects, and to convert the same into money; but he is not trusted with the distribution, which is the province of the commissaries, whose factor or trustee the executor is. He cannot pay to any mortal, but by their warrant or decree; so far as he pays upon their authority, it is a sufficient exoneration; but if he make voluntary payments without such authority, he pays at his peril; he will not be allowed credit for such payment, unless where the debt would in all events be preferable. His case is precisely similar to that of a factor upon a sequestrated estate, who can make payment to no creditor without a special warrant of the Court. And this is the solid foundation in law for the rule, that an executor cannot pay without a decree; not even excepting an executor-testamentar, who without decree cannot pay any debts but what are given up in the testament, and appointed to be paid by the executor.

If this doctrine be well founded, an executor cannot in his exoneration take credit for debts due to himself. The nomination of an executor, whether by the Commissary or by the deceased, implies no privilege as to debts due to the executor; he cannot pay to himself more than to other creditors, without the authority of the Judge Ordinary; and he must have a decree for his warrant in the one case, as well as in the other. Nor is there any difficulty of obtaining such a warrant, either by applying in his own name, or by assigning his debt to a trustee in order to sue for payment. And, if the law stood otherwise, it would be gross iniquity to give any creditor the office of executor; for it would be giving him a preference before all the other creditors, without the least colour of justice or equity. It could never certainly be intended to give the Commissaries such an arbitrary power over the property of others. But what is still worse, it may often happen that the Commissaries have it not in their power to remedy this evil. It is an established rule, that the next of kin claiming the office, must be preferred before the creditors; the Commissaries are not at liberty even to conjoin a creditor with them. Here will be injustice established by law; for it is in other words giving a preference to a creditor who is the next of kin before all the other creditors; though in all other cases debts *inter conjunctas personas* lie under the strongest suspicion. But the most glaring absurdity of all will be in the case of an executor-testamentar. A man who knows his circumstances to be wrong, has no more ado, but to appoint his favourite creditor to be his executor. The other creditors have no means to remedy this injustice; they cannot crave to be conjoined with an

No 25. executor-testamentar; he must enjoy the office alone, though the consequence be, that at one sweep he exhaust the inventory by the debts due to himself.

If such be the undeniable consequences of the executor's doctrine, his claim can have no foundation in the common law of Scotland; for it would be absurd to suppose the law of any civilized country so unjust. It is true, the act of sederunt 1662, puts it in the power of creditors to prevent this injustice. But then, if an executor had not this privilege originally, which is endeavoured to be made out above, he cannot have it at present; for it is not the intention of the said act to bestow such a privilege, but rather the contrary. At the same time, this act is but an imperfect remedy, since its benefit subsists but for six months; and when persons die in credit, this short time elapses without any diligence.

At the advising the cause, Elchies gave his opinion upon the authority of Sir Thomas Hope, that an executor may make payments to himself. But he distinguished betwixt debts due to the executor himself, and debts outstanding, where he is only cautioner; with regard to the latter, he admitted, that an executor can have no preference, because the debts are not paid. Arniston observed, that Lord Stair puts this matter upon the footing of compensation, which extends the privilege to a cautionary engagement.

" Found, that the petitioner, being confirmed executor-testamentar to Patrick M'Dowal his father, was preferable before the other creditors of the said defunct, for payment of the debts wherein he stood cautioner, or otherways bound for the said defunct; and likewise found, that the petitioner as executor foresaid, was preferable before the other creditors for the debts paid by him, and to which he obtained assignation before the date of his confirmation."

What prevailed here over principles of law and equity, was an established opinion, founded on the authority of Lord Stair, and of some singular decisions, that an executor is entitled to plead compensation. The pernicious consequences, however, of this judgment may be prevented by diligence within the six months. And hereafter, it is supposed, no creditor will neglect the privilege given by the act of sederunt.

Rem. Dec. v. 2. No 63. p. 98

* * * D. Falconer reports the same case.

1744 December 22.—PATRICK MACDOUALL of Crichen named his son Mr Charles Macdouall, advocate, his sole executor and universal legatar, and burdened him with the payment of his just and lawful debts. On this testament, Mr Macdouall was confirmed executor more than six months after his father's death, under protestation, that his acceptance of the foresaid nomination, with the burden of the defunct's debts, should only subject him thereto to the extent of the inventory given up, and what he might thereafter eik to the same, and as accorded of the law.

Mr Macdouall had been bound with his father in some debts that were outstanding at his death, part of which he had paid before confirmation, and since the same, and had also, before confirmation, paid some debts, for which he was not engaged, for all which he claimed a preference to the other creditors, as being creditor to his father for relief, and alleged, that this preference was due to an executor.

The LORD ORDINARY, 15th February 1743, found, " That the debts paid by the executor before confirmation, and those debts paid by him since confirmation, or for which he stood bound, were only to be ranked on the subject of the father's estate, *pari passu* with the debts due to the other creditors; and, 23d November 1743, adhered."

Pleaded in a reclaiming bill for Mr Macdouall, In competitions amongst creditors, the laws of all countries favour the vigilant, the first arrestment by an hour is preferred; and thus it was amongst executors, till, by the act of sederunt 1662, it was ordained, " That all creditors of defunct persons using legal diligence at any time within half a year of the defunct's death, by citation of the executors-creditors, or intromitters with the defunct's goods, or by obtaining themselves decerned and confirmed executors-creditors, or by citing of any other executors confirmed, should come in *pari passu* with any other creditors who had used more timely diligence, by obtaining themselves decerned executors-creditors, or otherwise." But this is not extended *in infinitum*, nor is it reasonable the most negligent creditor should be brought in *pari passu* with those who have properly attached their debtor's effects.

Had Mr Macdouall confirmed himself executor-creditor, he would doubtless have been preferable, and the Lord Ordinary has found him entitled to a *pari passu* preference, though he has done no other diligence than his general confirmation; and if it be once admitted, this gives a preference, there is no medium, it must give it for the whole, as being equal to a confirmation as executor-creditor. When any one is possessed of two characters, it were whimsical to require the title to be made up on both; the general comprehends the particular; and therefore, if one is confirmed executor-nominate, or nearest of kin, it were absurd he should also be confirmed as creditor. The law in this case does not oblige him to take a decret against himself, nor to assign to another to have it taken in that person's name; and nobody can with reason complain, since, by doing diligence within six months, they can bring in themselves *pari passu*; and here Mr Macdouall did not stir till the six months were out; so that, during that time, any body might have applied. Stair is express on this point, B. 3. T. 8., § 73, 76, and 77; and here this author makes no distinction betwixt debts originally due to the executor, and debts paid by, or assigned to him after the death, and before confirmation. The law has inhibited him from voluntary payment, after he is actually in the office, but it has gone no further. It was found agreeably to what Mr Macdouall here pleads,

No 25.

19th December 1740, Hamilton of Olivestob, and Mr James Baillie, against the Creditors of Menzies of Gladstones, No 29. p. 2099. Mr Thomas Menziès being confirmed executor to Sir William, his father, the Creditors pursued his cautioners, who excepted upon debts paid by the executor before confirmation, and for which he had taken discharges or assignations.

Answered, The powers of an executor, by the law of Scotland, are not equal to those of a tutor, who can pay creditors at his own hand, and prefer one to another, as the proprietor might, unless interpellated; but an executor's business is to get in the defunct's effects, and, as he is the Commissaries' factor, he cannot dispose of them without their warrant: Hence it is, that he cannot take credit for debts due to himself; he cannot pay himself more than any other, without the authority of a judge; and he may obtain a decret for his warrant, by assigning his debt to a trustee for that purpose.

Were it otherwise, it would be iniquitous to give the office to any creditor of a defunct; and this the Commissaries often could not help, since they are obliged to prefer the nearest of kin, and if such be a creditor, he is thereby preferred to all the rest; but the thing is still more absurd in the case of an executor-testamentar; for, by the rule contended for here, it is in the power of a man not solvent to prefer his most favoured creditor, by naming him his executor. Such are the consequences of this doctrine by the common law, and it may be doubted if they are at all obviated by the act of sederunt 1662; by it all creditors are preferred *pari passu*, who do diligence within six months, by obtaining themselves decerned executors-creditors, or by citing the executors; but there is here no mention of debts due to the executor himself, and if they are privileged, there are no words in the act to deprive them of that privilege, and bring in others *pari passu* with them.

The petitioner's argument, that a general title comprehends a particular, is specious, but fallacious, and not founded on principles; for as two confirmations are incompatible, a confirmation *qua* nearest of kin, or testamentar, is so far from implying one *qua* creditor, that it excludes it. It has already been noticed, that a confirmation on a general title gives no authority to pay without warrant from the Commissary; it does not give the executor power to pay himself more than any other; therefore it is not a confirmation as creditor, which is nothing else but the obtaining power to intromit with the defunct's effects, and to apply them to the person's own payment; so that this argument is plainly begging the question.

It is taken for granted, without reason, that if the petitioner had confirmed as executor-creditor, he would have been preferable; but probably the event would have been otherwise; for such a step, either before or after the six months, would have alarmed all the creditors, who would have got themselves conjoined; and it is plain he has lain by till the time was over, depending on a preference, as executor-testamentar; which office, he knew, could not be refused him.

The opinion of Lord Stair, in a point whert he is single, cannot be sufficient to establish a doctrine, which is an inlet to so much injustice ; and as he carries it so far as to give a preference to debts acquired never so short while before confirmation, it would put it in the power of an executor to prefer any creditor he pleased, by taking assignations to their bonds, giving his own in their place, and then confirming ; and here he might make his own profit, by preferring those that offered him the largest compositions. In the case Olive-stob and Baillie against the Creditors of Menzies, there was this particularity, that Mr Menzies being served heir to his father, was obliged to pay his debts, for which he had relief of the executry ; and he being also confirmed executor, the LORDS sustained these payments to exhaust the inventory against negligent creditors ; but here they have put in their claims *quamprimum*, and no good reason can be given to prefer an executor more than an heir *cum beneficio*, who must do diligence, if he has a mind to compete on his debt.

Laying aside this general topick, the petitioner ought to have no preference, because he is named with the burden of the defunct's debts, and gets a subject assigned him for that purpose. In this trust he must deal equally, he cannot prefer one creditor to another, nor himself to them all. Suppose the testament had contained a particular list of debts, he could have paid them without decret ; but he must have paid all alike, as the purchaser of an estate, bound to pay creditors in a particular list, must do, if the debts exceed the value, 20th July 1714, Blair against Graham, No 22. p. 7744. By accepting the testament, he becomes bound to pay all his father's debts, if not universally, at least as far as the subject will go ; the obligation is equally to all, and this bars all preference, except in so far as a creditor forces it by diligence.

THE LORDS found, That the petitioner being confirmed executor-testamentar to his father, was preferable to the other creditors of the defunct, for payment of the debts whereon he stood creditor to him at his death, for relief, or otherwise ; and also found, that the petitioner, as executor foresaid, was preferable to the other creditors for the debts paid by him, and to which he obtained assignation before the date of the confirmation.

Act. H. Home.

Alt. Lockhart.

Clerk, Murray.

D. Falconer, v. I. p. 33.

1745. June 7. The LADY CROWDIEKNOWS against The CREDITORS.

No 26.

If a trustee of an adjudication recover payment out of a collateral security for the same debt, though

WILLIAM CRICHTON of Crawfordtown left several children, amongst whom were John his eldest son, and Anna a daughter, married to John Bell of Crowdieknows ; and having died in bad circumstances, several adjudications were led against his son, which, upon his death also, were purchased in by Crowdieknows, and an adjudication led by him besides for his Lady's portion. This

No 26.

he has not been assigned to it, this will impute in extinction of the adjudication.

A disponent to an adjudication having recovered part of his debtor's effects, in virtue of his wife being executor to him, found obliged to impute them in payment.

process was against herself, as having then become apparent heir to her father.

Crowdieknows's affairs having also gone wrong, his estate was adjudged, and as part of it, the estate of Crawfordtown; and the whole being, after his death, brought to a judicial sale, compearance was therein made by William Veitch, writer to the signet, adjudger in trust from his Lady, the apparent heir of Crawfordton, and several objections made to his adjudications thereon.

Objected to an adjudication led by the Duke of Queensberry, and transferred to Crowdieknows; That Coupland of Collieston being debtor to Crawfordtown in 2000 merks, he assigned it to Douglas of Fingland, for the behoof of the Duke of Queensberry, in part of a greater sum due by him to the Duke, which sum, with an adjudication thereon, was by his Grace made over to Crowdieknows, and Collieston's bond delivered up to him without any transference thereof; but of which he had since received payment; and by this means had got payment *pro tanto* of the adjudication.

Answered; The receiving this money did operate no extinction; for, 1st, there could be none in the person of the Duke, as the bond was never in him, but stood vested in his factor, though as an additional security for his behoof;

2^{dly}, In Crowdieknows there was none; for, by receiving the money, he became debtor to the executry, as he was creditor to the *hereditas jacens*;

3^{dly}, Supposing his lady both heir and executor to her father, neither of which she then was, as she had not made up titles, and had a sister; yet compensation does not operate till it be proponed, and the pursuers of the sale are singular successors, adjudgers from Crowdieknows of the adjudications standing in his person.

Replied, The bond was assigned to the Duke's factor in part payment of the debt due to his constituent, and was never in Crawfordtown's executry; and so the money being received by the Duke, or by Crowdieknows in his right, must impute as payment, and this may be objected to singular successors.

THE LORD ORDINARY found, 'that the debt due by Collieston ought to impute *pro tanto*, to extinguish the Duke of Queensberry's adjudication;' and the Lords, on bill and answers, adhered.

1745. July 26.—In the cause between these parties, it was *objected* to the adjudications led, and purchased in by Crowdieknows, That there having been a bond of 2000 merks granted by Robert Maclellan of Barclay, and Samuel Maclellan his brother, to John Crichton of Crawfordtown, this was confirmed by Crowdieknows, in name of his wife, as nearest of kin to her brother, and he had thereupon assigned it to a person who recovered payment thereof; and, therefore, he having intromitted with this sum belonging to his debtor, while the adjudications stood in his person, it behoved to impute in payment of them, at least he thereby became debtor in the sum received, as he was creditor in the sum adjudged for, and this introduced a compensation,

Answered; That there could be no compensation betwixt an adjudication and a personal claim; and, besides, there was no *concursus crediti et debiti* between the same persons, as the bond belonged to his lady, who, not making up titles to the estate, was never debtor in the sum adjudged for.

THE LORD ORDINARY found, ' That the debt due to John Crichton by the Maclellans was not to be imputed towards the extinction of the adjudications, reserving to the Lady to recover that debt as accorded.

At advising a bill and answers, it occurred to some of the Lords, that it might make a difference, whether his adjudication for his Lady's portion, led against herself as apparent heir to her father, proceeded on a renunciation or a decreet on the passive titles, for in that case she was debtor; but others thought if the decreet had passed without a renunciation, this could not have been made use of against her to subject her to the debt, because her husband ought to have taken care that she should have renounced; and therefore it could not be urged in her favours.

THE LORDS, 7th June, adhered.

Pleaded in a reclaiming bill; That Alexander Ferguson of Isle had, upon debts due to him by Alexander Crichton of Crawfordtown, led an adjudication against John, his son and apparent heir, which proceeded on a decreet on the passive titles, he having in this case neglected to renounce, which was acquired by Crowdieknows; and the bond recovered by him being originally granted to John Crichton, he had recovered so much of his proper debtor's effects, which behoved to impute as payment.

Upon answers, the LORDS, 12th July, found, that the debt due by the Maclellans to John Crichton was imputable in extinction of the debt due to Ferguson of Isle; and this day refused a bill, and adhered.

Alt. W. Grant et Ferguson.

Act. A. Macdoul.

Clerk, Kilpatrick.

D. Falconer, v. 1. p. 93, & 124.

1747. June 5. JAMES HALIBURTON against BLACKWOOD of Pitreavie.

SIR ROBERT BLACKWOOD of Pitreavie, William and Robert Blackwoods merchants in Edinburgh, granted bond for L. 2000 Scots to Birny of Broomhill, and William and Robert granted to Pitreavie a bond of relief.

James Haliburton, writer to the signet, paid Broomhill upon an assignation, and thereupon pursued Mr Robert Blackwood of Pitreavie, son to the granter, who *pleaded*, That money had been imprest into Mr Haliburton's hand to make the payment, by Robert Blackwood, then collector of the cess for the city of Edinburgh, co-obligant with Pitreavie, and from whom he had a bond of relief; that, therefore, the debt being extinguished by the debtor's money, it was wrong in Mr Haliburton to take an assignation thereto.

No 27.

A person having lodged with his friend an accepted bill, as a fund for raising money, and having got it from him, and paid a bond which he owed, on an assignation to himself, it

No 27.

afterwards appearing the debtor did not use the fund of credit at that time, though he did it afterwards; it was found he could not use the assignation against a cautioner, the bond being paid with the debtor's money.

Mr Haliburton being appointed to confess or deny; declared that he agreed with Robert Blackwood to borrow, on their bill, L. 180 Sterling, out of the Royal Bank, to pay Mr Birny, and that for his security he should take assignation to the bond; that, accordingly, on the 13th December 1735, he accepted and delivered to Robert Blackwood a bill, blank in the date, for L. 181: 10s. who that same day gave him L. 172: 11: 6, which, with a note of Dalserf's, for L. 10 odd shillings, he also that day paid to Broomhill, and got the assignation; that the bill to the bank was from time to time renewed, until that, 3d April 1737; they gave their joint bill for L. 121, which he paid 8th July 1738, extending, with interest and charges thereon, to L. 128: 7: 1-half pence, which was all he demanded.

Pleaded for Pitcairie; This account of the transaction appeared to be false; for, by the bank-books, Robert Blackwood got from the bank, 13th December, L. 230 on his cash-account, which besides appeared from his own general account of cash, wherein he had also made this entry, To Js. Haliburton L. 130; To ditto To pay my bond to Dr Birny L. 183: 6: 8.

The first borrowing by them was 18th December L. 145, also marked in Blackwood's private account of cash, which was executed by Blackwood's depositing in the bank a bill of Haliburton's to him, of the 13th, for L. 180, as a security for the principal then borrowed, and interest; but if this was the onerous cause of his taking the assignation, it was a fraud concerted between them to keep up the bond against Blackwood's cautioners after it was paid by the debtor's money; and, to effect this, Haliburton had granted a bill, which might, at any time, be given up, that, upon pretence thereof, he might say the money was his.

The money borrowed on this deposit was paid 10th August 1736, at which time no new bill was granted, as would have been the case if the debt had been continued, by renewing the security; but, on the 25th September, there was a new bill granted by them for L. 181: 10s., renewed 3d April 1737 for L. 121, and paid by Haliburton 8th July 1738; but the distance of time, from the payment of the former borrowing, shewed this to have been a new contraction; and thus, it appeared, Mr Haliburton's account of the matter was not true, but the debt was really paid with Mr Blackwood's own money.

Pleaded for Mr Haliburton; That Mr Blackwood being prest for Birny's bond, applied to him for his assistance, and he gave him a bill for L. 180, payable 2d February 1736, to be a fund for raising the money; that the same day he got from him that sum, with the remaining odd money, which he paid to Mr Birny, and, as they had agreed, took an assignation to the bond; that it now, indeed, appeared Blackwood was able to raise the money without immediate assistance, as he did not make use of the credit afforded him till 18th December; but, at that time, it becoming necessary for him to replace the money he made use of, he raised it upon the deposite of Haliburton's bill, by borrow-

ing thereon L. 146 : 4 : 2, and having paid the same 10th August 1736, he, no doubt, got up his deposit ; but having still occasion for a further supply, retained it for that purpose ; that, 25th September, he got on Haliburton's security L. 130, for which they gave their joint bill, and did not deposite the former, as more than six months were elapsed from the date, and of this transaction there remained a holograph memorandum in a pocket-book of Blackwood's, viz. that they then accepted a bill for L. 181 : 10s. for which he had received L. 180 ; that, 8th April 1737, Blackwood made a partial payment ; and, taking up the old bill, they granted a new one for L. 121, which Haliburton paid 8th July 1738, amounting to L. 128.

This state of the case, which appeared from the bank accounts, did not, as was alleged, differ from the account given by Mr Haliburton, except that from memory he had said they jointly accepted a bill, whereas he had given his bill to Blackwood, who deposited the same, with a blank indorsation ; but, as the one was drawer, and the other acceptor, they were both bound to the bank, and it was properly their joint bill.

The bill then, which was as good as money, and on which Blackwood actually raised money, was a sufficient onerous cause for the assignation ; and, as Haliburton had since paid for it, or that which came in its place, he craved the benefit of his security to the extent of what he had disbursed.

Certificate by the Accountant to the Royal Bank.

1735.

Dec. 18. Royal Bank, lent Robert Blackwood, collector of the cess in Edinburgh, *per* bill, payable at 60 days after date, for

L. 146 0 2

Per deposit of his bill on James Haliburton, writer to the signet, dated 13th December, payable 12d February, for L. 180.

1736.

Aug. 10. The above bill paid for L. 146 : 4 : 2.

1736.

Sept. 25. Ditto lent the said Robert Blackwood and James Haliburton, writer to the signet, *per* bill at ditto's date for

181 10 0

1737.

April 8. The above bill paid.

1737.

April 8. Ditto lent same two persons, payable at ditto's date

121 0 0

1738.

July 8. The above bill paid.

No 27.

Royal Bank, Edinburgh 7th February 1743. That the above are taken from the books of the bank, is certified by

WILLIAM MITCHELL, *Accountant.*

Abstract from ROBERT BLACKWOOD, Merchant in Edinburgh, his Cash-Account with the Royal Bank.

The Bank Debtor.

The Bank Creditor.

1735.

1735.

Dec. 18. To L. 145

L. 145 0 0

Dec. 13. By my order for

L. 130

L. 130 0 0

By ditto for L. 100 100 0 0

 L. 230 0 0

Abstract from ROBERT BLACKWOOD's Account of Receipts and Payments of Money the Month of December 1735.

Receipts.

Payments.

1735.

1735.

Dec. 13. From the bank L. 230 0 0

Dec. 13. To James Haliburton

From Dalsers in full of

L. 130 0 0

his bill - 10 15 3

To ditto to pay my

16. From A. Blackwood 13 0 0

bond to Dr Birny 183 6 8

From ditto the L. 80

16. To J. Haliburton 40s. 2 0 0

per bill in full 80 0 0

To the bank - 145 0 0

From James Ramsay 55 0 0

18. To the bank - 50 0 0

18. From ditto - 50 0 0

To ditto 145 0 0

From the bank on James

Haliburton's bill of

L. 180 - 145 0 0

THE LORDS found, that the debt was paid with Robert Blackwood's own money, and therefore James Haliburton could not make use of the bond assigned to him against the cautioners, reserving to him action against the representatives of Robert Blackwood.

Act. W. Grant.

Alt. Hamilton.

Clerk, Kirkpatrick.

C O 111

D. Falconer, v. 1. No 180. p. 241.

1751. February 22. MARGARET SYMER against DAVID DOIG.

JOHN LIVINGSTON, in 1702, disposed his estate of Balrownie to Sir David Arnot, who was succeeded by Helen his sister: She disposed it to Mr James Ker, minister at Dun, who was infeft 1709; and having served the disponent heir to her brother, and infeft her, expedite a charter on her resignation, and was again infeft 1732.

Mr Ker acquired, amongst several other incumbrances on the estate, an heritable bond granted 1670 by David Livingston of Balrownie to John Symer, whereon infeftment had followed 1705, by purchase from Margaret Symer, John's grand-daughter, whom he infeft on his precept of *clare constat*; and, on her disposition, 3d July 1731, infeft himself 8th of that month.

David Doig of Cookston led an adjudication of these lands against Patrick Livingston, apparent heir to John, upon debts of John's, acquired by Patrick's trustee, and made over to Mr Doig; as also on Patrick's own bond; and another on Patrick's irredeemable disposition; as also another 1739, against David, Patrick's son, on a debt of John's; and, on this last title, insisted in a reduction of the disposition to Sir John Arnot, founding upon it as it was on a prior debt secured by inhibition, which would entitle him to reduce, in so far as it was prejudged, in case he failed in his total reduction, which, however, he prevailed in, 13th February 1741, the side-scriptions of the disposition being forged.

Mr Ker then founded on an adjudication in his person, which was sustained as a right in security; and insisting on *bona fides*, in the perception of the rents, to stop imputation of the excess over his annualrent, to the extinction of his principal, this was repelled; and, 27th January 1743, all his rights were found extinguished, he being charged with crop 1740, and proceedings since his entry.

Margaret Symer, 23d October 1741, revoked her disposition, and pursued a reduction on the heads of minority and fraud; on which last she obtained decret, 11th January 1743. These processes, though at once pendent, were not conjoined.

Margaret Symer being reponed, pursued a poinding of the ground. To which it was answered for Mr Doig, The debt was extinguished by Mr Ker's intromissions while it stood in his person.

Pleaded for the pursuer; Mr Ker, beside the disposition which is now reduced, had in his person a title of property, to wit, the adjudication, the legal whereof was run, and thereon he was *bona fide* possessor. It is true this, when it was opened, could not hinder his intromissions from being imputed to the extinction of his capital secured thereby; but if he had had no other title, it would have saved him from repetition; consequently the rents *bona fide* consumed ought not to be imputed to the extinction of another incumbrance he

No 28.

A right to an heritable debt being reduced, payments made during the subsistence of the right were sustained against the reducer.

No 28. had on the estate, which he had purchased to disincumber his right, and not to make a title of possession; and therefore the heritable bond is not extinguished; especially it ought not to be found extinguished in prejudice of the pursuer: Mr Ker could not impute his intromissions to the extinction of the bond, which he had obtained the disposition of from her by fraud and circumvention; and though it is found against him, at the instance of Mr Doig, that they must be imputed to all the rights in his person; this cannot prejudice her a third party not in that process, and whose reduction was pendent before the interlocutor.

Pleaded for the defender; All Mr Ker's intromissions charged upon him, and wherewith the whole rights in his person were found extinguished, were before intending the pursuer's reduction; *bona fides* might save him from repetition, but not from imputing the rents to his whole incumbrances, and amongst the rest to this debt which he held from the pursuer by disposition, though reducible.

THE LORDS found, that the intromissions had by Mr Ker behoved to impute to the pursuer's heritable debt then in his person.

Reporter, *Kilkerran*.

Act. *H. Home*.

Alt. *A. Macdowal*.

Clerk, *Justice*.

D. Falconer, v. 2. No 203. p. 245.

Payment, when presumed. See PRESUMPTION.

See APPENDIX.

PAYMENT BEFORE HAND.

1602. *January 14.* JOHN HOME *against* WALTER CARNGROSS.

JOHN HOME, master hunter to his Majesty, having obtained the escheat of Walter Cairncross, and general declarator thereupon, pursued certain particular tenants of the said Walter's lands, for payment of the farms of the years 1599 and 1600. It was *excepted* That the pursuer could have no right to the half farms of the year 1599, because the said Walter's escheat could not fall before the committing of the crime, and the crime being committed in August 1599, or thereby, and he only denounced in October thereafter, he had undoubted right to the farms of that year, at the least to the half farms of that year; for albeit farms be not paid while betwixt Yule and Candlemas, yet they are owing, having respect to Whitsunday and Martinmas; and if the heritor decease before Martinmas, the half farms of that year will appertain to his executors, because he lived after Whitsunday, and so the term of Whitsunday being past before committing of the said crime, and before this denunciation, it was lawful to him to receive payment of the half farms, and give his acquittance thereupon, which may exoner the tenants at all hands. To the which it was *replied*, That albeit respect be had to the division of the farms according to the time of the decease of the heritors, when the question is betwixt the defunct's executors and his heirs, yet, in other cases, there is no such respect had to the prejudice either of the master's creditors, or the King's donatar; but the terms of Yule and Candlemas are only respected, before the which there can no lawful payment be made by the tenant to his master, or any other in his name, or at his command, of his farms, and if any thing be done in the contrary, it will not stand, nor be found lawful; otherways it should lie in the master and tenant's hands by collusion, and antedated acquittances, to defraud all creditors of their debts, and lawful arrestments and poindings, and the King's donatar of the escheats and profits of the liferent. In respect of the which reply, the LORDS repelled the exception, and found, that as the tenant

No 1.

In a pursuit at the instance of a donatar of escheat against the rebel's tenants, the Lords refused to sustain their exception of payment made to the rebel himself, because it was done before the term.

- No 1. could not be compelled to make payment of his farms before Candlemas, so he could not, by his voluntary payment before the term, prejudice either creditors or his Majesty's donatar.

Fol. Dic. v. 2. p. 52. Haddington, MS. No 665.

- No 2. 1611. *January 31.* WILSON *against* WARROCK.

A TENANT being called to make his farms furthcoming, as arrested for payment of his master's debt, will not be heard to defend himself by an alleged payment, made upon an assignation made by the master to pay a part of his duty as free mail, because it is not lawful, by private assignations betwixt the master and the tenant, for payment of mails or farms before the term, to prejudice the arrestments of lawful creditors of their just debts.

Fol. Dic. v. 2. p. 52. Haddington MS. No 2136.

- No 3. 1628. *February 29.* LAIRD OF CLEGHORN *against* HIS FATHER'S TENANTS.

A DONATAR to a liferent having obtained a general declarator, and having arrested, in the rebel's tenant's hands, their mails and duties, pursues them for the same by a special declarator. The tenants *allege*, That they had paid the mails to their master before the arrestment. It was *replied*, Their payment before the term could not be allowed.—THE LORDS repelled the tenant's allegiance in respect of the reply.

Fol. Dic. v. 2. p. 52. Auchinleck, MS. p. 62.

. Durie reports this case ::

IN a special declarator of L. Cleghorn's liferent, at the L. of Lauchop's instance, donatar thereto, against the tenants of the rebel's lands, for payment of their farms, the years 1626 and 1627, which farms were arrested in their hands by the donatar long before the terms of payment, viz. before Martinmas the said years; and the defenders *alleging*, that they had advanced to their master the said farms, and satisfied him of the prices, convened betwixt him and them therefore, before hand, before the arrestment, which they alleged they might lawfully do, even before the terms of payment, he being then and of before their master, to whom they have been in use to pay their duties, and for whose supply and help in his necessities they might do the same lawfully at any time, nothing being done to hinder them when they transacted and made the said payment. This allegiance was repelled, and the payment advanced before the terms of payment was not sustained to liberate the tenants, seeing,

PAYMENT BEFORE HAND.

10023

Before the said terms of payment, the donatar had arrested the same *debito tempore*; for, if it should be lawful to allow this payment made before hand, before the terms, the donatar and creditors might ever be prejudged; and, therefore, those who pay before they can by law be compelled, must do the the same *suo periculo*, and not to the hurt of others, and they should provide for their own relief.

No 3.

Act. Mowat.

Alt. ———.

Clerk, Hay.

Durie, p. 352.

1629. June 12.

GRAY against CAMPBELL.

No 4.

SOME feu mails, for divers years and terms to come, paid and advanced to the heritor or liferenter, or any other having right to the lands, by the tenants, is not allowed to liberate the payer of those terms which were not come the time of making of the payment, if he, to whom the payment was made, shall happen to be denuded of his right, in favours of any other, before the expiring of these terms, the duties of which terms will pertain to him, who then shall have right to the land, notwithstanding of the tenant's payment making to his master before hand, the master then having a right undenuded, but prejudice of the tenant's relief against the master to whom he paid, or for whom he paid. to another, there being no real deed done by the tenant to affect the land to him, whereby to retain the duties for his relief.

Fol. Dic. v. 2. p. 52. Durie, p. 445.

1662. January 7.

EARL of LAUDERDALE against TENANTS of SWINTON.

No 5.

Payment of rent made at entry, such being the custom of the barony, found relevant against a donatar of forfeiture.

EARL of LAUDERDALE, as having right to the forfeiture of the barony of Swinton, pursues the tenants for mails and duties. {George Livingston, one of them, *alleges*, That he must be assoilzied from one year's duty, because he offers him to prove, that it is the custom of the barony of Swinton, at least of a distinct quarter thereof, that the tenants do always at their entry pay half a year's rent, and are free of rent at the term they remove, and so do all along pay a year, at the least half a year before the hand; and subsumes, that he has paid accordingly to Swinton himself, for a term's mail, due for the crop which is after the pursuer's right. The pursuer *alleged*, *Non relevat* against him a singular successor, or against the King his author; because, that party that hath right to the land, hath right to the fruits, and so to the rents which are payable for the fruits which were extent upon the land, or growing after that party's right, and no payment before the hand can liberate the possessor.

No 5.

from the pursuit of a singular successor; therefore it hath been frequently found, that payment before the hand is not relevant against an appriser, yea even against an arrester; so that the King and his donatar (since their right was established and known) cannot be excluded by payment before the hand to a party who had no right to the land, or to the fruits, that year; otherways both the King and creditors might be defrauded by fore-mails, or by tacks appointing the fore-mail to be paid the first term, (whatsoever length the tack be); *adly*, Any such allegiances were only probable *scripto vel juramento*. The defender *answered*, That the case here is not like the fore-mails instanced, because every year is paid within itself; and so the first year, the half at the beginning thereof, and the half at the middle thereof, and subsequent years conform, which must be sufficient to the tenant; otherways paying at Whitsunday and Martinmas, should not be liberated, because the whole year is not run out; or a tenant paying his farms at Candlemas should not be secure against singular possessors for the profit of grass thereof till Whitsunday.

THE LORDS found the defence relevant, and the custom of the barony to be proven by witnesses, and likewise the payment of the duty in so far as in victual; and also for the money not exceeding an hundred pounds termly.—
See PROOF.

Fol. Dic. v. 2. p. 52. Stair, v. 1. p. 75.

1667. February 5.

LADY TRAQUAIR against MARION HOUATSON.

No 6.

The exception of payment made *bona fide*, found not to extend to payment made by a tenant, or by a subtenant to the tenant, before the term.

THE Lady Traquair pursues Marion Houatson for the mails and duties of a part of the liferent lands, who *alleged*, Absolvitor, because her umquhile husband, who was immediate tenant to the umquhile Earl, had *bona fide* made payment to him. Likeas the defender being only subtenant to her son, had *bona fide* made payment to her son of her duty. The pursuer *answered*, That neither of the allegiances was relevant; because any payment that was made by the defender, or her umquhile husband, was before the term of payment, and so could neither be said to be *bona fide*, *nam ex nimia diligentia suspecta est fides*, neither could it prejudice the pursuer.

THE LORDS were all clear, that the payment made by the principal tacksmen before the term was not relevant; but, as to the payment made by the subtenant to the principal tenant, the Lords debate the same among themselves, some being of opinion, that the subtenant's payment *bona fide* before the term was sufficient, because he was only obliged to the principal tenant, and he might have a tack for a less duty than he, or for an elusory duty, which, if he paid, and were discharged, he was not convenable; and oft-times the subtenant's term was before the principal tenant's; yet the LORDS found, that payment made *bona fide* by the subtenant to the principal tenant was not relevant, and that because the master of the ground has action, not only against the

tenant, but also against the sub-tenant, or any who enjoyed the fruits of his ground, and may convene them personally for his rent, as well as really he has an hypothec in the fruits; neither can the subtenant prejudice the master of the ground of that obligation and action, by paying before the term, otherwise he might pay the whole terms of the tack at the very entry thereof, and so evacuate the heritors interest as to the subtenant; yea, though the subtenant's tack-duty were less than the principal tenant's, it would not exclude the heritor pursuing him as possessor for the whole, but only give him regress for warrandice against the principal tacksman; but the term being come, if the heritor arrested not, nor pursued the subtacksman, he might impute it to himself, and the subtacksman might justly presume, that the principal tacksman had paid, and so might pay him *bona fide*.

Fol. Dic. v. 2. p. 52. Stair, v. 1. p. 435.

*** Newbyth's report of this case is No 28. p. 6221. *voce* *HYPOTHEC.*

See APPENDIX.

P E E R.

1633. July 11.

OLIPHANT *against* OLIPHANT.

SIR JAMES DOUGLASS having married the only bairn and daughter of umquhile the last Lord Oliphant, and she being served heir general to her immediate predecessor, who died before her said father, pursues *hoc titulo*, as heir to her said predecessor Patrick Oliphant, nearest heir-male in blood to her said father, for annulling a contract made betwixt him and her father, whereby he dispones all his lands, together with the title and dignity of the Lordship of Oliphant to the said Patrick and his heirs-male, which failing, to return to the disponent and his heirs-male, containing a procuratory of resignation; to hear and see it reduced, because it was a paction for honour, which is not *in commercio*, not being allowed by the prince, *qui est fons omnis honoris*, and so is null, and the defender to be decerned to have no right to that title, and that the title pertains to the pursuer as nearest heir *in recta linea* to him, to whom that title belongs, notwithstanding of the said contract. THE LORDS considering, after that the parties' reasons were *hinc inde* heard, and at length disputed in presence of the LORDS, that the pursuer had founded the pursuit upon her claim, as heir to her grandsir, and not upon any succession, as heir to her father, which father was served heir to the same person her goodsir, before his decease; likeas, her father had bruiked the title of Lordship during his lifetime, by riding in Parliament, and by being designed in the infeftment of his lands, granted to him by the king (his cousin) with the title of Lord Oliphant, and by doing of all other acts, whereby it might appear, that he was Lord Oliphant, there being no writ more extant, nor patent, to show any erection of it in a Lordship, or whereby he or his predecessors were created Lords, but only the custom foresaids, and such acts as before mentioned; they found, that this use was enough conform to the laws of this realm, to transmit such titles in the heirs-female, where the last defunct had no male children, and where there was no writ extant to exclude the female; and because by the

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No 1.

Found that a peerage being resigned in the Crown's hands, not *ad remanentiam*, but *in favorem* of a third party, the resigner was actually denuded.

No 1.

contract foresaid, the pursuer's father had disposed the title to the defender, *ut supra*, in the which there was a procuratory of resignation, albeit the king had not conferred the honour according thereto. THE LORDS found that the pursuer had no right to claim this honour, in respect her father was last possessor, and died in possession, by the acts foresaid, (there being no sasine requisite for the title thereof) and therefore seeing her father had disposed the same, as said is, she could never misken him, who behoved to be reputed as *in tenemento*, and pass to her grandsir in a higher degree, to eschew the deed of her father, whose deed she behoved to warrant, if she pursued as heir to him, or by right competent to her as nearest to him; and therefore the LORDS excluded this pursuer, as not having right to this dignity, seeing the king had not conferred the same upon her, and that her father, as said is, by the foresaid contract had renounced his right thereof; which albeit it was not found by the LORDS to be a sufficient right, to establish the honour in the person of the defender, which no subject can dispose, without the approbation of the prince, which being acquired, then the act convalesces; yet it was found enough to denude himself, and his descendants, ay and while the prince should declare his pleasure, and either confer the honour on the pursuer, or defender, at which the act will take perfection; and in the mean time, seeing the prince had not interponed himself to allow any of these acts, they found, that none of the said parties could claim the said honour, but it remained with the king, which he might confer to them he pleased: For albeit honour be not annailziabie by buying and selling, yet the LORDS found, that the party having it, might quite his own interest, which albeit it would not avail him in whose favours he had done it, unless the prince should allow it, yet it was enough to denude him as said is. *See SUCCESSION.*

Act. Nicolson.

Alt. Stuart.

Advocatus for the King present.

Fol. Dic. v. 2. p. 53. Durie, p. 685.

1710. February 7.

JOHN BRYSSON and CLAUD HENDERSON Merchants in Glasgow, *against*
The DUKE of ATHOL.

No 2.

IN the action of forthcoming at the instance of John Brysson and Claud Henderson, against the Duke of Athol, as debtor to Jean Hardie, relict of Hugh Hardie merchant in Perth, James Hardie her brother, and John Hardie merchant in Edinburgh.

THE LORDS found, that Peers are bound to depone in common form, in cases where the libel is referred to their oath, as the only mean of probation.

Fol. Dic. v. 2. p. 53. Forbes, p. 395.

* * * Fountainhall reports this case :

No 2.

THE Duke of Athol being pursued by a merchant in Perth, for an accompt referred to his oath, he *alleged*, by the articles of the Union, he had all the privileges due to the English Peers, whereof this was one, not to be obliged to depone, but only to declare upon their honour. This point was fully debated in the case of Arnboth against the Duke of Gordon, where it was argued, that, by the English law, they had not that method of proving by oath, as in the common law and customs of other nations; and when they give in their articles upon oath, it is no more than an oath of calumny upon the matter, that they think they have reason to believe it to be true. THE LORDS were very cautious ere they proceeded to determine this, and wrote to the Chancellor and Judges of England by the President, to get some light and directions therein; but they shunning to give any opinion in so nice and delicate a point, the LORDS found this day, that Peers were bound to depone where the oath was final and decisive of the cause, whatever they might plead in oaths of calumny or credulity, as oaths *in litem*, or on the verity of debts, or the like.

Fountainhall, v. 2. p. 564.

1711. February 9. The EARL of WINTON's Case.

No 3.

THE LORDS, upon report of the Lord Bowhill, found that Peers ought to give their word of honour only instead of an oath of calumny; but that they should depone in common form, where things are referred to their oaths of verity; because no probation by oaths of verity takes place in England, where a Peer's word of honour doth pass for an oath.

Fol. Dic. v. 2. p. 53. Forbes, p. 494.

1711. December 19.

JAMES DUKE of MONTROSE *against* M'AULEY of Ardincaple.

No 4.

IN the reduction and declarator at the instance of the Duke of Montrose against Ardincaple, about the right to the heritable bailiary of the regality of Lennox, the pursuer being cited upon an incident diligence, as haver of the defender's rights;—the LORDS found, That the Duke in this case of exhibition, ought to depone in common form; the oath demanded in an exhibition, not being an oath of calumny. In the reasoning of the LORDS upon this point, one said, that the defender in an exhibition might be held as confest for not appear-

A peer called upon an incident diligence as a haver of writs ought to depone in common form as to the having.

No 4.

ing, or refusing to depone ; and therefore, an oath in an exhibition is *litis decisorium quoad* the deponent. And though the pursuer could not be hindered afterwards to produce the writ formerly called for in the exhibition, notwithstanding the defender's oath ; yet he could never oblige the defender to depone again upon his having thereof, nor fix the same against him by any other probation. Another of the Lords thought, that an exhibition approached to the nature of a probation by witnesses : And therefore, Peers called therein should depone in common form, seeing by the law of England they depone so as witnesses.

Fol. Dic. v. 2. p. 53. Forbes, p. 555.

* * * Fountainhall reports this case :

The Duke of Montrose, pursuing a reduction and declarator against M'Auley of Ardincaple's right to the heritable bailiary of the regality of Lennox, and craving certification ; it was *alleged* by the defender, the writs instructing my right are in your own hands ; and refers the having to the Duke's oath. *Answered*, I will search my writs, and on my word of honour shall declare, If I can find any thing can prove your allegiance. *Replied*, Though the privilege of the English Peers be communicated to the Scots, yet *non constat* this is one of them ; for whatever they may plead in what we call oaths of calumny, yet not where it is decisive of the point referred thereto. And it is certain, before the Union, our Peers enjoyed no such privilege ; and it must be instructed that the English have it ; and there being application made to know their customs, no satisfactory answer can be obtained. And the point has been several times tabled, and debated before the LORDS, and now it can be no longer delayed. And the LORDS found in this case the Duke behoved to give his oath, being an exhibition on the matter. If the House of Peers in England shall declare otherwise, the LORDS will readily follow their determination, after they come to know it, but till then they cannot be blamed to follow their former laws and customs.

Fountainhall, v. 2. p. 689.

1716. December 13.

ELIZABETH YOUNG and her HUSBAND *against* The EARL of BUTE.

No 5.

Second diligence against a peer, how executed.

THE pursuer's grandfather being creditor to Stewart of Kilkattan, he assigns the debt in trust to the deceased Kelburn upon his backbond ; and accordingly, he did adjudge, in *anno* 1681, for the accumulate sum of L. 13,300 Scots ; and, after his decease, the Earl of Glasgow, his son, corroborates the bonds, but thereafter consents to a disposition of the lands of Kilkattan, made by the laird thereof, in favour of the Earl of Bute ; whereupon the pursuer, as having right

from her grandfather, did insist against the Earl of Glasgow, in respect he contravened the obligations in his said back-bond; and in this process a diligence being granted against the Earl of Bute for exhibiting the said disposition, and the first diligence being returned, and the second granted, this being in effect a caption, which could not be put in execution against the Earl of Bute, being a Peer, a petition is given in for the pursuer, craving that the LORDS would adhibit a remedy, and founding on a late practice against the Earl of Kincardine, where the LORDS assigned a certain day to exhibit the writs called under a penalty equal to the damage that the pursuers incur through the failure in exhibiting; and, there being no answer to the petition,

‘THE LORDS grant diligence to the petitioner to cite the Earl to compare within three weeks, or thereby, to exhibit the writs called for, under the penalty of L. 50 Sterling; but prejudice of the petitioner’s claim of further damages, as accords of the law.’

Act. *John Dundass.*

Alt. *Dun. Forbes.*

Clerk, *ut supra.*

Bruce, v. 2. No 43. p. 58.

1756. July 29.

M'DONALD against a WIDOW of a PEER.

THE widow of a Peer being debtor to M'Donald in a certain sum of money, due by bill, he raised and executed a horning against her, and afterwards applied for letters of caption.

The Lord Ordinary reported the bill to the LORDS; who were of opinion, that the widow of a Peer was intitled to all the privileges of a Peer, and therefore,

“ They refused the bill.”

Fac. Col. No 212. p. 309.

. See the case of Campbell against Countess and Earl of Fife, No. 211. p. 9404. *voce* OATH OF PARTY.

See APPENDIX.

P E N A L T Y.

1549. March 22.

HOME against HEPBURN.

IN causa Georgius Home de Broxmouthe *contra* Jacobum Hepburn de Kirklandhill, Dominum de Waddel et alios duos penes 4 lib. monetæ Scotiæ sibi promiss. per illos pro portionibus, viribusque, casu quo, infra certum tempus non deliberaverunt dicto Georgio quendam Anglum ad personam ipsius Georgii, in qua re ipsi defecerunt et exceperunt, quod dicta summa apposita erat nomine pœnæ adjecta, et quod de practica Scotiæ pœnæ non prestantur nisi quatenus interest, et ipsi offerebant interesse actoris in hoc casu, et ejus liquidationem petierunt ab eo ipso; quia hoc casu pœnam simpliciter petebat. Interlocuti sunt domini in re presenti, penes deliberationem angli promissam sub pœna, hanc pœnam præcise peti posse in odium anglorum, in favorem republicæ, nec actorem cogendum accipere interesse, cumque in hoc casu difficillima foret probatio ipsi actori. Et ita definitive condemnarunt reos in dicta pœna, licet regulariter, extra hunc casum, de practica regni, pœnæ conventionales non possunt exigi, nisi quatenus interest actores, quia sapiunt quendam usuram et inhonestum questum, quod de jure canonico vide in cap. "Suam," exa. de pœnis, et in cap. "Abbas," exa. de iis quævis metusve causa gesta sunt.

Fol. Dic. v. 2. p. 53. Sinclair's MS. p. 96.

No 1.
Conventional penalties no further eligible than for the real damage.

1622. November 29.

SEMPLE against SEMPLE.

MR GEORGE SEMPLE having charged Bryce Semple as cautioner to pay a sum contained in a bond made to Mr George for the penalty, the letters were found orderly proceeded for the principal sum of 500 merks. The question be-

No 2.
Penalty modified against a cautioner in a bond to the ordinary an-

No 2.
qualrent of
the sum, the
bond bearing
no annual-
rent.

ing for the penalty, I proponed, that albeit the cautioner was bound conjunctly and severally, yet it was notour by the bond that the debt was not his, and the cautioner so long as he was not charged, had probable opinion that the principal had been paid; and finding the contractor by the charge, did his duty by offer and consignation of the principal. But, it being known by the process, that Bryce had known that the principal was not paid, because he had paid two years annual for continuation; albeit, the bond contained no annual, the LORDS found the letters orderly proceeded for so much of the penalty as answered to the annual unpaid.

Fol. Dic. v. 2. p. 53. Haddington, MS. No 2683.

No 3.

1627. *March 28.*

AYTON against PATERSON.

MR JAMES PATERSON is charged to fulfil a minute made betwixt him and Mr Robert Aytōn, whereby the said Mr James was obliged to pay 4200 merks to the said Mr Robert, for the discharge of the reversion of Craigfuthie, and both the parties are obliged to fulfil this minute to each other under the pain of L. 1000. Mr James alleges he might resile from the minute paying the pain.—THE LORDS found he might not resile.

Fol. Dic. v. 2. p. 54. Auchinleck, MS. p. 148.

No 4.

1628. *December 16.*

MARGARET CRAIG against OLIVER SINCLAIR.

MARGARET CRAIG obtained a decret before the Commissaries of Edinburgh against Oliver Sinclair, decerning him to solemnize the bond of marriage with her. Thereafter, Oliver gives her a bond whereby he obliged himself to complete the marriage with her betwixt and a certain day, and in case of failzie to pay to her 300 merks. She registrates this bond, and the day being past, raiseth letters of arrestment, and arrests certain sums owing by the Lady Lothian to the said Oliver, and conveneth her and him for his interest for making the same forthcoming. *Alleged*, No process at the pursuer's instance, because she is cloathed with a husband, (viz. the said Oliver who is decerned to marry her) and so she could not pursue her own husband. *2do*, No process for the failzie before it be declared. *3tio*, No process for the sum acclaimed, it being a penalty for not completing the marriage, so which a man could not bind himself by law, *quia matrimonia debent esse libera*. *Answered*, *1mo*, Albeit the Commissaries have decerned Oliver to marry the pursuer, yet so long as the same is not accomplished, it is but *in fieri*, and he is not her husband. *2do*, No necessity of a declarator, because there being a special day set down in the bond, *dies interpellat*, and the day being past she may pursue for the penalty. *3tio*, *Ma-*

trimonia sunt libera quidem liberis, but Oliver has not that benefit by reason of the decret, whereby he is decerned to marry her. THE LORDS repelled the whole three allegiances.

No 4.

Fol. Dic. v. 2. p. 53. Spottiswood, (MARRIAGE.) p. 203.

* * Durie reports this case :

ONE Margaret Craig having obtained a decret before the Commissaries of Edinburgh against Oliver Sinclair, decerning him to take her to his lawful wife, and to complete the bond of marriage with her, before the face of holy kirk; after which sentence he gives bond to her, to solemnize the said marriage betwixt and a certain day, and in case of failzie, to pay to her 500 merks; which bond being registered, she thereupon arrested certain monies owing by the Lady Lothian to him, and thereupon pursues to make the same forthcoming; which action was sustained for payment of the sum adjected in the bond, for a penalty, after the expiring of the day prescribed by the bond, and to make the sums arrested forthcoming therefor; notwithstanding, that it was *alleged*, that it was evident by the decreets and writs produced, that the said Oliver was the pursuer's husband, and so she cannot have action against her own husband. And next, it was *alleged*, that no declarator was obtained upon the failzie. 3dly, It was *alleged*, that pains adjected for fulfilling marriage are not allowed in law, *quia matrimonia debent esse libera*; which allegiances were all repelled, and the action sustained at the woman's instance without declarator, seeing it was not subsumed that they were married; and the action was allowed and sustained for payment of the sum adjected in case of failzie, because whenever he should complete the marriage, the sum would return to himself.

Act. Craig.

Alt. Balser.

Clerk, Gibson.

Durie, p. 409.

1630. March 19.

CRICHTON against PIRIE.

PIRIE being charged to deliver certain quantities of straw to Crichton, conform to his bond, and the other suspending; because, by his bond, he was obliged only to deliver the same betwixt and May, which was not as yet come, and, in case of failzie, to pay a penal liquid sum, which he was content to pay at the day, and so he could not be compelled to pay, or deliver the straw; the LORDS found, that the subjoining of the foresaid penal sum, in case of non-delivery, liberated not the debtor from fulfilling of that, which was principally deduced in the obligation; but that, notwithstanding of the provision of the

No 5.

Payment of the penalty does not liberate from performance.

- No 5. failzie, he ought to fulfil the obligation, by and attour the paying of the failzie; but superseded the execution, while the day came.

Clerk, *Hay*.

Fol. Dic. v. 2. p. 53. Durie, p. 510.

1632. *June 14.* ALEXANDER CLARK *against* CAIRNCROSS, &c.

No 6.

GEORGE LAMBIE of Dunkenny having borrowed from Alexander Clark of Logie 1000 merks, for which there should have been cautioners for him, William Halyburton, and other two, who, because they were not present the time of subscribing of the bond, Dunkenny and Nicol Cairncross with him, and other two, obliged themselves to cause the absent cautioners subscribe the bond betwixt and the 15th of August following, 1629; and, failing thereof, to content and pay to Alexander L. 100. Alexander charged Cairncross, &c. for fulfilling of their bond; who suspended upon this reason, that they could not make the cautioners subscribe, but were content to pay the L. 100 *loco pena*.—THE LORDS found the letters orderly proceeded, for fulfilling of the whole bond, and would not free them for paying of the L. 100 of penalty.

Fol. Dic. v. 2. p. 54. Spottiswood, (CONTRACTS, &c.) p. 69.

* * * Auchinlock reports this case.

ALEXANDER CLARK charges Nicol Cairncross of Balmasharmor, Thomas Anand of Persie, and James Lyal, to fulfil a bond made to him by the Laird of Dunkenny and the foresaid persons, wherein the Laird of Dunkenny obliges him, and the said persons, to cause certain persons subscribe a bond of 1000 merks to the said Alexander Clark, as cautioners for the said George Lambie of Dunkenny, betwixt the date of the bond and Lammas thereafter; and, failing thereof, bound and obliged them to content and pay to the said Alexander Clark the sum of L. 100 at Martinmas thereafter. They suspended; and are content to pay the penalty of L. 100, as the said bond bears; but the LORDS found the letters orderly proceeded, for causing the cautioners subscribe, notwithstanding of the adjacent penalty.

Auchinleck, MS. p. 149.

No 7.

Found in conformity with Aiton 2-
against Pater-
son, No 3.
p. 10034.

1634. *March 5.* MURRAY *against* Lord BLANTYRE.

By a minute of contract subscribed betwixt these parties, the Lord Blantyre sells the lands of Calderhall, &c. to Ronald Murray, for a sum, and the parties

agree that a contract be extended thereon, and if they fail, the failer to pay 2000 merks; which minute being desired to be registered, that execution might pass thereon; the defender *alleged*, That, seeing the minute was never perfected, and that the same resolved in a failzie of 2000 merks, and that the party had no interest by the not-perfecting thereof; therefore, he *alleged*, That it could not be registered, seeing it was *factum impræstabile* to give him security of the lands, which he had sold since to another, being certified that this pursuer had refused the bargain, and he had neither debursed arles nor money; so that *nihil illi deerat*, and he was instantly content to offer and satisfy all his damage and interest, and which now ought to be received, seeing the minute was desired to be registered, not for extention, but for execution; and this offer was competent against the execution.—THE LORDS repelled the allegiance, and found, that the adjection of the penalty in the minute resolved not the contract, so that the same was appointed to come in place of the perfecting of the minute; but, notwithstanding of the said penalty, the parties might also seek implement of the minute, and whole articles thereof, beside and attour the said failzie: And they repelled the offer of the interest in this place against the registration, without prejudice of the same to be received, and discussed by way of suspension.

Act. *Advocatus & Morwat.*Alt. *Stuart & Lermont.*Clerk, *Hay.**Fol. Dic. v. 2. p. 54. Durie, p. 708.*

1637. July 15.

SKENE against ———.

LANDS being verbally let to a tenant, under a penalty, that, if he entered not, he should pay a year's rent; the whole penalty was found due, though the tenant resiled *rebus integris*.

*Fol. Dic. v. 2. p. 53. Durie.** * * This case is No 10. p. 8401. *voce* LOCUS POENITENTIAE.

1639. February 22.

JOHNSTON against FORBES.

ROBERT JOHNSTON sets in tack, for five years, the lands of Robert Forbes, wherein the said Robert Forbes is obliged, by a special clause, to pasture his whole goods upon the said lands yearly, during the said space, and to hold his goods within the byres and stables, and to hold the thatch within the town, and to ware the whole gooding within the town, during the years of the tack; and, in case of failzie, to pay L. 100; upon the which tack

55 U 2

No 7.

No 8.

No 9.

Where a tenant had failed in performance only as to the last year of his tack, found not liable for the whole penalty.

No 9.

the setter obtained decret before the Sheriff of Aberdeen, for payment of the said L. 100, because the tacksman, the last year of the tack, gooded not the ground ; and, therefore, he was decerned to pay the sum : Which decret being suspended, the LORDS found, that the decret before the Sheriff being given upon probation of the not-gooding the ground the last year of the tack, could not import condemnator for payment of the whole penalty, albeit the clause of the tack bore, to pay the same, in case of failzie, indefinitely, and did not astrict the payment of the whole to the failzie of all the years ; and, therefore, found, that for the failzie of one year, no more could be decerned by the Sheriff but the fifth part of the penalty, which answered in proportion to the five years of the tack ; and suspended the letters *simpliciter* for the rest of the L. 100, notwithstanding of the sentence given against the party compearing, and a sentence of the LORDS upon an anterior suspension, where the letters were found orderly proceeded for the whole.

Fol. Dic. v. 2. p. 53. Durie, p. 877.

1688. July 28.

LEARMONT against GORDON.

No 10.

Whether the whole penalty can be sought where part of the debt is paid ?

THE LORDS advised the process betwixt the Earl of Balcarras, as assignee constituted by Mr Robert Learmont of Balcomie, (contrary to that title of law, *ne quis in potentiorum titulos suos transferat*.) and Mr William Gordon, Advocate, who, to balance it, had assigned to the Duke of Gordon a year ago ; and who founded on an expired comprising of the lands of Balcomie, mentioned 12th January 1686. The reason of reduction was, that, though the apprising defaulted a part of the sum as paid, yet it was led for the hail penalty, which it should also have deducted proportionally. *Answered, Pœna est jûs indivisibile*, as Calvin in his Lexicon, *voce* POENA, affirms ; so that how long any part of the principal sum is due, the hail penalty *in rigore* is exigible. Yet Durie, 22d February 1639, Johnston, No 9. p. 10037. observes the LORDS divided the penalty. Before answer here, the LORDS declared they would call for some of the oldest Writers to the Signet, who had as Clerks led apprisings, and would advise what had been the custom : And they all, generally, (except Mr Thomas Gordon,) resolved, that, in such a case, the penalty should have been restricted ; whereon the LORDS reduced the comprising *quoad* the legal, and found it only a security for the sums therein contained, and no further, which was all Balcomie was seeking.

Fol. Dic. v. 2. p. 55. Fountainball, v. 1. p. 515.

1695. December 26.

BEATTIE against LAMBIE.

WILLIAM BEATTIE bailie of Bervie against Mr Sylvester Lambie, for reduction of a minute of agreement, whereby the Privy Council having given him the vacant stipend of the church of Meigle, for building a bridge over Bervie water, Mr Lambie made him believe it was only 1100 merks by year; so he set him a tack of it for 1000 merks; whereas, now he understands it is worth L. 1000 *communibus annis*, and this year, by reason of the dearth of victual, it will amount to no less than L. 100 Sterling; so being over-reached, he ought to be reponed, especially he being an administrator could not dilapidate; 2do, The minute never being extended, there was *locus pœnitentiæ* till extension; 3tio, There was only one subscribing witness, and so it was null by the act of Parliament 1681, and was not suppliable by condescending on others, or their designations. Answered to the first, It was a bargain of hazard, like *jactus rētis*, and there was no *dolus dans causam contractui*, and though *læsio ultra dimidium justi pretii* is a ground of restitution by the Roman law, yet it had never been adopted as any part of ours; 2do, A minute subscribed could no more be resiled from than an extended contract; 3tio, The act 1681 did not hinder him to supply the defect, by referring the verity of the subscription to his oath.—THE LORDS repelled the reasons of reduction, and whoever else might quarrel this bargain on circumvention, this pursuer could not.

No 11.
The offering of a penalty does not resolve the contract. It does not make the obligation alternative, either to perform or pay the penalty.

1695. December 27.—In the cause Beattie against Lambie, mentioned 26th current, Beattie represented by a petition, That the minute bore a penalty of L. 200 Scots, in case of failzie, and wanted the adjection of that usual clause, "by and attour the performance of the premises;" and so craved to be free on paying the penalty, or so much as the Lords should modify *nomine damni*.—THE LORDS found the offering a penalty did not resolve, irritate, or annul the contract to which it was adjected; and the inventing that clause, that it should be *over and above*, was superfluous, and only *ad majorem cautelam*, and that it did not make the obligation alternative, either to perform or pay the penalty; in which case, the debtor would have his election; and which decision is consonant to former practiques in Durie, 19th March 1630, Crichton, No 5. p. 10035.; and 4th March 1634, Murray, No 7. p. 10036.—THE LORDS thought Beattie over-reached in the bargain; but did not see it so competent to him as to the Moderator and Ministers of the Presbytery wherein this church lay, or to the Collector of the vacant stipends, to reduce a paction so prejudicial to a public, pious, and charitable work.—See WRIT.

Fol. Dic. v. 2. p. 50. Fountainhall, v. 1. p. 692. & 693.

1697. February 24.

THOMAS KINCAID against The L. of COCKBURN'S CREDITORS.

No 12.

A bankrupt estate being sold, and the creditors ranked, the preferable creditors claimed not only principal and annualrent, but penalties, which cut off the posterior creditors. They were found, *prime loco*, entitled to the penalties, in opposition to the application of the postponed creditors, made after decree had been extracted.

THOMAS KINCAID of Auchinreoch gives in a bill to the Lords, representing he was a considerable creditor to Cockburn of that Ilk, and that the estate being now sold, and the creditors ranked, the preferable creditors craved payment, not only of their principal sums and annualrents, out of the price in the purchaser's hands, but likewise of their penalties, by which posterior creditors will be exceedingly prejudged; and therefore craved, that principal and annualrents might be allowed to each creditor, conform to his preference, before any get their expenses; and then, if there be a superplus, the same to be divided equally among them for their penalties. It was doubted, on the one hand, how preferable creditors could be cut short of their penalties, especially in so far as they had actually debursed it in diligences against their debtor, it being as due as the stock; and on the other hand, penalties are but due by personal obligations; and in some former rouns of Carlourie, &c. the LORDS had taken that method, as favourable to posterior creditors. However, the LORDS demurred somewhat upon it; for it was *alleged*, That the former practices were in respect the creditors had consented thereto. But the LORDS refused it in this case, because of the decret of ranking being extracted, it was not *debito tempore* craved; likewise, if they had been cut off from their penalties on Cockburn's estate, they would have recurred on my Lord Sinclair, whose estate they had likewise adjudged, as cautioner for Cockburn, his father-in-law.

1700. July 4.—IN the ranking of the Creditors of the Laird of Cockburn, mentioned 24th February 1697, it occurred to be debated, if the infeftments of annualrent were not only preferable *quoad* their principal sum and annualrents, but also for their penalties and termly failzies; at least for their debursed expenses, to be modified by the Lords. Some thought them real, and to affect the reversion, seeing the debtor could not redeem, without he likewise paid their expenses. Others thought the buyer at the roup noways liable thereto, but only for the principal and annualrents, and the expenses were personal *quoad* him; though the price seemed to come in place of the land out of which the annualrent is upliftable. Yet the LORDS found the creditor-infeftor had no action in law against the buyer, to force him to pay the penalty; but likewise found the buyer could not force the annualrenter to denude or convey his right, till he were satisfied of all, seeing he had provided for his expenses by the same security, whereon he had trusted the *sors* and stock; but that the annualrenter had right of retention of his right till he were paid, seeing the acts of Parliament, about rouns, did not design to take away private parties' rights, or cut them off from the expenses. It was *urged* against this, That it might

disappoint that useful and necessary law of selling by roup; for, where many annualrenters affected such an estate, the buyer could not disburden the lands of these infestments, without giving them likewise their penalties, which would exhaust more than the price he was to pay; for he could not compel them to take their principal sum and annuals, unless he likewise offered the penalties. But it was *answered*, That the 6th act 1695, provided a clear remedy for this, where the buyer is allowed to consign the price in the Town of Edinburgh's hands, where the creditors are unwilling; and in that case he is declared free, and the lands disburdened; and the infesters, rather than have their money consigned, only to pay them 3 *per cent.* will think it better to accept of their principal and bygone annuals; which method makes room for posterior creditors to get something; whereas, if the annualrenters got their expenses, it might exhaust the whole price. 'I find, by the Roman law, retention was allowed, but action refused to one who has bestowed meliorations in building on another man's ground, where the *dominus soli* vindicates the whole; § 30. *Instit. De Rer. Divis.*

Fol. Dic. v. 2. p. 54. Fountainhall, v. 1. p. 770. & v. 2. p. 101.

1702. January 9.

SIR JOHN COCHRAN of Ochiltree *against* The LORD MONTGOMERY.

THE Lord Ross, Lord Montgomery, and seven others, gave a written commission to Sir John Cochran to bid at the roup of the poll, imposed by the act of Parliament 1693, and not to exceed L. 40,000 Sterling, unless he were allowed by Colonel Erskine and Sir Thomas Kennedy to bid further. Sir John was preferred as the greatest offerer, but he exceeded their commission in L. 4100 Sterling. Thereafter the tacksman and partners entered into a contract, whereunto there were about 22 assumed; and the Lord Montgomery, by a missive letter, declared his willingness to be one of that number, and sent a commission and warrant to William Cunningham of Brownhill to vote for him at the meetings as his proxy, and accordingly he is marked in two sederunts as acting for my Lord Montgomery. The tack eventually falling to be detrimental, and my Lord Montgomery conceiving himself not bound by the foresaid letter and proxy, neither of them being formally recorded in the society's books, Sir John Cochran pursues him to relieve him of a proportional part of the loss and damage resulting from the tack.—*Alleged* for my Lord, *absolutor*, because you exceeded our commission in bidding beyond the L. 40,000 to which you was limited.—*Answered*, I had the concurrence and allowance of the two assessors adjoined to me, and they being present and not contradicting, are presumed to have given their consent.—THE LORDS found taciturnity was not a sufficient concurrence nor acquiescence here, but *ex officio* ordained them to be examined

? No 13.

The Lords acquitted one of many contractors, who had resiled, he paying the penalty, the words 'by and attour performance' not having been in the deed.

The tacksmen of a branch of the revenue assumed partners, under the *proviso*, that these partners should find caution by a certain day, or pay a penalty. One of them was found free on paying the penalty.

No 13. upon oath if they consented.—*2do*, *Alleged* for my Lord, I cannot be liable as one of the 22, because my letter was not only an offer, and never accepted, but repudiated ay till they found they would be losers; and if it had been profitable, he could never have compelled them to communicate any share of the gain, and so it was plainly *societas leonina* as to him; and the first nine undertakers were to have been liable *in solidum*, because *electa erat industria personæ*, and they knew one another's solvency and sufficiency: But in 22 assumed they can only be liable *pro rata* for their 22d share, seeing they had not that knowledge and confidence in one another; and Sir John might as well have assumed 200 as 22, for whom it were absurd to think the Lord Montgomery should stand liable.—*Answered*, The letter is conceived in the most strong and obligatory terms of his design and willingness to continue a partner, and is further strengthened and adminiculate by his proxy given to Brownhill. In the reasoning among the LORDS a decision was cited, (No 25. p. 8411.) between Sir Robert Montgomery and one Brown, where, notwithstanding of a letter declaring he intended to adhere to the bargain, yet there was found room to resile, *et locus pœnitentiæ*; but here the LORDS found Lord Montgomery liable for his 22d part upon his letter and commission.—Then my Lord *alleged*, in the *third* place, That the most he could be found liable in was only for L. 50 Sterling, as the penalty annexed to his non-acceptance, in so far as, by an express quality and condition of the contract, it is appointed that all the partners are, betwixt and the 6th of August 1694, to grant bond and caution for their proportion, and in case of failzie, their share is to be void and null as to them, but to accresce to the rest, and to be liable in L. 50 Sterling of penalty.—*Answered*, This being adjected in further corroboration of the contract, can never be de-torted to liberate them from the same, but must be interpreted *modo habili* to be over and above implement; and if by your own fault you did not give bond and caution, you ought to reap no benefit thereby, else after your entering into the society it should be in your power to be a partner or not.—THE LORDS found, by the foresaid quality and conception of the contract, my Lord Montgomery was free upon his paying the L. 50 Sterling of penalty, by which interlocutor he was relieved of L. 200: for his 22d share amounted to L. 250 Sterling. As to the being liable *in solidum* or *pro rata*, I remember some decisions in the *Rota Gennensis* shews cases where *socius non tenetur socio in solidum*.

1702. February 21.—SIR JOHN COCHRAN having reclaimed, by bill, against the interlocutor marked 9th January 1702, betwixt the Lord Montgomery and him, and the LORDS adhering, he gave in his protestation for remedy of law to the Parliament; as also against the interlocutor assailing Tarbet and Prestonhall, his brother, from being partners of the poll, on the like or parallel grounds; for my Lord Tarbet, in absence of his brother, having signed for him, and he, on his coming to town, declining to accept, the LORDS found Tarbet's obligation *pro alio* resolved only into the penalty, *Vide* § 3. *Institut. De inutil stipulas.*

No 13.

for which the doctors give this reason, that all contracts must take their origin *ex nostra persona*, and where they do not, *non habet obligatio radicem unde fluat in paciscentem, nec basin ubi stabit*; vide l. unic, C. *Ne uxor pro marito*; and in these cases, some maintain they are obliged no further but to do their utmost diligence and endeavours to cause the other perform; but generally, they conclude he incurs the penalty expressed, *et ejus solutione liberatur*, unless where it bears *salvo manente pacto*, which we call over and above the premisses; and then both are due, and paying the penalty does not exoner.

Fol. Dic. v. 2. p. 54. Fountainball, v. 2. p. 136. & 150.

1706. July 27.

THOMAS BAIRDINER of Cultmill, against WILLIAM DRYSDALE, Tenant there.

No 14.

THOMAS BAIRDINER having acquired the lands of Cultmill by an adjudication against the heritor, did enter into a contract with William Drysdale the tenant, who had married one of the heritor's two daughters and heirs portioners, whereby the said Thomas Bairdiner was obliged to renew the tack for the space of 19 years upon payment of the former tack-duty, and to grant him a discharge of a year's rent then due; and William Drysdale obliged himself to grant a disposition with consent of his wife, of all pretence or claim that she had to the lands, and to cause her sister to do the like betwixt and a certain day, under the penalty of 100 merks in case of failzie. William Drysdale being charged to implement his obligation, he suspended upon this reason, That to procure his sistet-in-law's consent to the disposition, was *factum imprestable*, for she would by no means consent; and therefore the charger could only seek damage and interest, which he liquidated in the obligation to 100 merks of penalty; upon payment whereof the suspender is free, seeing the clause, by and attour the implement of the premisses, was not adjected.

The debtor in an obligation *ad factum prestandum*, under a penalty, without the clause, 'by and attour the implement of the premisses,' found liable only, in case of non performance, for the penalty.

Answered for the charger; as the sanction of a law is only to enforce the observation of it, by subjecting transgressors to the penalty; so the adjecting of a penalty to an obligation is only designed as a compulsory upon the debtor to fulfil, and to render the obligation effectual; the words by and attour implement of the premisses, being only added ordinarily *ob majorem cautelam*. And if it had been intended that the suspender should be liberated upon payment of the penalty, that would have been exprest, as also that all things done in contemplation of the foresaid obligation should be restored. It is of no moment that the suspender pretends he cannot procure his sister-in-law to consent to the disposition; for he ought to have foreseen that difficulty before his engagement. And persons obliged to consent of third parties, were not liberated from the principal obligation, even where no penalty was adjected, but found liable to fulfil *in forma specifica*; Purie against Couper, *voce* WARRANDICE;

No 14. Wedderburn against M'Pherson, *voce* SURROGATUM. Far less can it be conceived, how the adjecting of a small penalty, (which is only done for defraying the charges of diligence in case of not performance) should render it arbitrary to the debtor to perform or not as he pleases; when the principal obligation may be ten times more valuable than the penalty. *Vide* Stair, Instit. L. 1. T. 17. § 20. *in fin.*

Replied for the suspender; The cited decisions do not meet the case in hand, where the penalty is not conceived by and attour performance; but adjected in place of fulfilling the obligation.

THE LORDS found the letters orderly proceeded for the penalty; but suspended them as to the principal obligation.

Fol. Dic. v. 2. p. 54. Forbes, p. 132.

1739. February 2. TRUSTEES of MENZIES against DENHAM.

No 15.
Penalty and
termly failzies
found not
preferable in
a ranking.

WHERE a creditor was infest upon an heritable bond for security of his annualrents, which contained this usual clause of reversion, 'Redeemable always and under reversion, by payment of the principal sum and annualrents, with the penalty and termly failzies if incurred, and expenses of infestment to follow hereupon,' it was found in a ranking for the price, that the creditor in said bond was only preferable for his principal sum and annualrents, but not for his penalty or termly failzies, &c.

N. B.—Though the annulrenter has no preference for the penalty, termly failzies, or even expense of his infestment, not being infest for security of any of these, yet by the quality of the clause of reversion, he cannot be obliged to denude or convey till he be satisfied of all; in which if he persist, the only remedy is consignation.

Fol. Dic. v. 4. p. 56. Kilkerran, (PENALTY.) No 1. p. 375.

No 16. 1740. January 4. COUPER against STUART and his SPOUSE.

WHERE a bond containing a penalty is suspended, there is no avoiding finding the letters orderly proceeded for the penalty, unless the suspender pay at the bar; for it may be necessary to use diligence upon the decree, which may exhaust the penalty: But if thereafter payment shall be offered of principal sum and annualrents, together with the necessary expense, and the same shall be refused, it will be the ground of a second suspension.

This is understood *inesse* in all decrees, finding the letters orderly proceeded for the penalty: Wherefore a petition having been given in against an interlocutor, so far as it found the letters orderly proceeded for the penalty, the refusing whereof simply might have done the petitioner more harm than was intend-

ed, the deliverance was, ' to refuse *in hoc statu*, reserving to the suspender, if ' payment of principal, annualrents, and necessary charges should be offered ' and refused, to suspend as accords.'

No 16.

Kilkerran, (PENALTY.) No 2. p. 275.

1742. December 20. ROBERT ARNOT of Balsilly against Sir JOHN ARNOT.

No 17.

Is a conventional penalty wholly incurred, where there is only a partial or temporary failure?

SIR JOHN set a tack of a mill for 19 years to the charger, for the yearly rent of 2000 merks, to commence at Martinmas 1742; and the tack concluded with the following usual clause: And, lastly, " Both parties bind and oblige themselves, and their foresaids, to perform the hail premisses to others, under the penalty of L. 100 Sterling, payable by the party failzier to the party observer, or willing to observe, by and attour performance."

Sir John having forgot to warn the tenant, who possessed the mill, to remove, he took advantage thereof, in order to keep possession for another year; whereupon Balsilly charged Sir John with horning for the whole penalty, who suspended upon this ground, That a conventional penalty could not be exacted further than to make up the real damage the party sustains by failure of implement. The Lord Ordinary on the bills passed the bill for L. 50 Sterling, but refused as to the remainder.

Sir John reclaimed, and *pleaded*, That as he was bred to the military life, and had been much out of the kingdom, he was ignorant of the necessity of warning the tenant who was in possession; and though this was not sufficient for a legal diligence, it ought to have some weight in the present argument; more especially as there was a solid difference in law betwixt a penalty stipulated, in case of not-performance, and a penalty stipulated by and attour performance. In the *first* case, The party has his option; and if he choose not to perform, he ought to pay. In the *latter*, the bargain is what is principally in view, which the parties mutually bind themselves in all events to implement, and the penalty is only to enforce performance; it is not supposed to be the meaning of parties, that either of them should put any money in his pocket, or catch at any *lucrum* by means of the stipulated penalty; it is indeed a good fund to make up what either has suffered by the other's failure, that is, for expenses and damages, but it can go no further. However, supposing a conventional penalty were to be strictly interpreted, the whole can only be due in case of a total failure; if the tacksman in possession could not be got removed for a week, or a month, it is not possible to plead the whole penalty could be incurred in that event; just so, in the present question, the delay of one year of nineteen cannot infer that the whole is incurred, for a partial failure should only imply a claim for a proportional part of the penalty; and this doctrine ought to hold, whatever the occasional damages may be. It is true, that where

No 17. one refuses to implement the bargain, there damages ought to ensue without limitation; but it is believed the legal construction of a stipulation for penalty is to liquidate the damages, that they shall not exceed that sum in case of inability to perform. To illustrate this, suppose the mill in question had been evicted, whereby performance became impossible, it is believed the charger's claim for damages could not exceed the L. 100 Sterling, whatever proof he might offer of great profits on his tack. For the same reason, where there is a partial failure, without the suspender's fault, whereby the charger's entry is delayed for a year, his claim of damages ought not to be sustained beyond a proportion of the penalty. See a case observed by Sinclair, 1549, *Home contra Hepburn*, No 1. p. 10033.; and the 20th June 1710, *Hamilton*, No 7. p. 3153.; 22d February 1639, *Johnston*, No 9. p. 10037.

THE LORDS remitted to the LORD ORDINARY to pass the bill; and what was the issue of this question the collector knows not.

C. Home, No 220. p. 362.

1755. February 19.

DUFF against CHAPMAN.

No 18.

An heritable creditor found preferable in a ranking not only for principal and interest, but for the penalty, to the extent of all expenses incurred in recovering the debt.

In a process of ranking of the creditors of Alterlies, William Duff being preferred, *primo loco*, for the principal and interest contained in an heritable bond and infestment; he also claimed preference for the penalty, to the extent of the expenses of infestment, of the costs of suit in this competition, and further, of the costs of suit in a former competition for the same debt, upon another estate, which belonged to a co-obligant in the bond, but wherein he had been cast.

Chapman admitted that Duff should be preferred for the expenses of the infestment, and of diligence, if any, against the debtor; but objected to the costs of suit in both competitions; *1mo*, For that the terms of this bond were, "for security of the principal sum, annualrents thereof, that shall happen to fall due, and penalty if incurred, and the other sums, charges, and expenses, contained in the reversion, if they be debursed and expended in the debtor's default. Now, the expenses in neither of the competitions were incurred through the debtor's default; and, *2do*, The expenses of the first competition were incurred in a different ranking with other creditors upon an estate belonging to another person, and were incurred by reason of the pursuer's litigiousness; for he was postponed. *3tio*, Granting he had a claim against the debtor for the penalty, to the extent of these costs, yet he ought to have no preference in competition with other creditors; because it was an absurdity that lands should be affected by an infestment for a debt taken before the debt existed.

Answered to the *first* and *second*, That all the costs justly expended in the recovery of the debt, and by consequence the expense of competition, are incurred through the debtor's default.

To the *third*, That infestment is given for the penalty, which is held to be an existing debt, though the LORDS, from their *nobile officium*, generally restrict it to the expenses really debursed.

"THE LORDS found, That William Duff was entitled to be preferred for his penalty, to the extent of the expenses in recovering his debt."

Act. Hamilton Gordon.

Alt. Burnet.

Clerk, Kirkpatrick.

Fac. Col. No 142. p. 213.

1757. December 23.

JOSEPH ALLAN, Portioner of Littlegowan, *against* JAMES YOUNG of Netherfield, and JOHN MILLER, Portioner of Hazzledean.

IN January 1750, Young and Miller entered into a contract with Allan, whereby Allan became bound to dispoise to them certain heritable subjects which had belonged to George Arkle, dyer in Strathaven, and were conveyed to Allan in security of a debt. On the other hand, Young and Miller obliged themselves to pay to Allan the principal sum of his debt, extending to 2950 merks, with the bygone interest, and expenses incurred in securing the same, all to be accumulated at Whitsunday 1750, "with a fifth part of the said sum so accumulated, of penalty and liquidated expenses, in case of failzie." The contract contained other conditions; and concluded with an obligation on both parties to perform the premises *hinc inde*, "under the penalty of L. 10 Sterling."

The purpose of this contract was, that Young and Miller, as trustees for Arkle and his personal creditors, should, with Young's concurrence, bring the subjects to a roup; and in case of their yielding more than Allan's debt, apply the surplus for payment of the other creditors. By the contract itself, John Marshall, Allan's agent, was appointed clerk to the intended roup; and by a separate missive addressed by Allan to Young and Miller, he declared, that in case the subjects should not sell above the extent of his debt, he would, upon their application, free them from the engagements they had undertaken by the contract; but thus qualified, "I always being put *in statu quo* as I was preceding this date, you making intimation to me of your not chusing to hold bargain with me, on or betwixt and the 25th of March next.

The subjects were, in the beginning of March 1750, exposed to roup. John Scot offered for them 3820 merks; and James Stevenson having offered 3900, was preferred to the purchase. Both these offers considerably exceeded the extent of Allan's debt; but no caution was found by Stevenson, in terms of the articles of roup; nor did Marshall, the clerk, insist against Scot, the next bidder, agreeable to those articles. Young and Miller thereupon resolved to throw up their concern, and get free of the contract. They made an intima-

No 19.

The penalty of a mutual contract upon which adjudication has not followed, cannot be exacted, for indemnification of expenses incurred in discussing a suspension of the contract, where the other party has not been specially found liable in such expenses.

No 19. thereof to Allan three days before the time limited for that purpose by Allan's missive.

Allan however refused to pass from the contract, and charged Young and Miller with horning to implement the same, particularly to pay him the sum thereby stipulated, as the price of the subjects, with a fifth part more of penalty, as incurred through failzie, and also to pay the mutual penalty of L. 10 Sterling likewise therein contained.

Young and Miller obtained a suspension of the charge; in discussing which, they *insisted*, That as the roup had proved ineffectual for answering the intended purposes, and they had intimated their resiling from the contract in due time, they were not liable in the obligations thereof. Allan *answered*, That they were debarred from resiling by the roup, which left matters no longer entire; so that he could not be put *in statu quo*, as the purchaser might still insist for implement of the articles.—The LORD ORDINARY, by two consecutive interlocutors, “sustained the reasons of suspension;” to which the LORDS adhered. But upon a second reclaiming petition for Allan, they were pleased to “find the letters orderly proceeded, and decern.” And Young and Miller having then reclaimed, the LORDS, on the 19th December 1755, “adhered to their last interlocutor, and refused rhe petition.”

When these interlocutors were pronounced, neither party applied to the Court for recovering expenses from the other side; but during the vacation, which followed soon after the last interlocutor, Allan extracted the decreet, in the precise terms of the charge upon which it proceeded, namely, decerning Young and Miller to pay him, not only the accumulated sum stipulated by the contract, but also the fifth part more, and the other mutual penalty of L. 10 Sterling, as incurred through failzie.

Young and Miller offered payment of the principal sum, interest, and expenses of security; but Allan likewise insisting for the whole penalties, as an indemnification of his expenses of plea incurred in supporting the validity of the contract, Young and Miller obtained a new suspension as to these penalties; and thereupon Allan took payment of the principal sum and interest.

Pleaded for Allan, the charger,

imo, Penalties were introduced into our law, to furnish a security to the creditor, which he might hold for indemnifying him of all expense and damage sustained through delay or stop of payment in any way whatever. In strict law, the whole penalty is due *ex forma verborum*, whenever the debtor allows the term to pass without payment or performance; and hence an adjudication is legally and validly led for the whole penalty the day after the term of payment. The LORDS indeed do sometimes modify exorbitant penalties; but in so doing, they act *ex nobili officio*, and take every equitable circumstance under consideration, so that all loss arising to the creditor by the debtor's not explicitly performing his obligation may be repaired. Thus, where a bond bore a penalty, but no stipulation that annualrent should be paid, the penalty was

allowed to be exacted to the extent of the interest, 29th November 1622, Sempill; No 2. p. 10033. Upon the same ground, in this case, the expenses incurred by the charger, in maintaining the validity of the contract, having exceeded the penalties, he is in equity entitled to exact these penalties for indemnifying him so far, and otherwise he would be a considerable loser.

2do, The charger pleads a *res hactenus judicata*, by the extracted decree of the Court, decerning for payment of the penalties, as well as the principal and interest. If the suspenders thought themselves aggrieved by the last interlocutors, whereon that extract proceeded, with regard to the penalties, they ought to have applied in due time, which they did not, whereby the decree became final. And,

3tio, Supposing the case open to review, yet decret would still fall to be pronounced for the penalties, not only as due *ex pacto*, as well as the principal and interest, but in respect of the circumstances of the case, which show, that the charger was unnecessarily put to expenses exceeding the penalties, in litigating the objections made by the suspenders to their being bound by the contract, which now stand finally over-ruled.

Answered for the suspenders, *imo*, Conventional penalties have been always considered as highly unfavourable, so that both law and equity have concurred in restricting them. Though due *ex obligatione*, yet they have been confined to the reparation of that damage which the creditor appears to have truly sustained by non-performance. In the case of adjudications, the law specially allows either a fifth part of the principal sum more, or the conventional penalty to be adjudged for, according as a special or general adjudication is suffered to pass, in order to indemnify the creditor for the loss he is supposed to sustain by being obliged to take land for his money. But that is a peculiar privilege given by statute to adjudgers; and in no other case is a creditor allowed arbitrarily to exact penalties, without having incurred to the extent of those penalties the damage or expense, thereby properly intended to be repaired. Interest is always understood to be due on a bond debt; and thence, in Sempill's case, the penalty was rightly taken, to supply the want of a stipulation of interest in the bond. Expenses of plea stand on a quite different footing. These are in no case due or exigible, unless the Court finds that a party has been litigious, and specially subjects him to the costs of his opponent, *in pœnam* of his offence. It is only the charges of expeding securities, or doing diligence for recovery of a debt, that are meant to be reimbursed by conventional penalties in bonds or contracts, (whereon no adjudication is led,) as such only are held to be strictly necessary, and in the view of parties at contracting, and not expenses of plea incurred in trying the question, whether the ground of debt is effectual or not?

2do, There is not here a *res judicata*, as to the exacting the penalties for indemnification of those expenses. The Court never had before the question as to such expenses under consideration. The words of the interlocutor were in

No 19. the common style, finding the letters orderly proceeded, and decerning. The more particular decerniture in the extract, for the penalties, was the operation of the extractor, in respect of the terms of the charge given for them, as well as for the principal sum and interest. As no expenses of plea were specially awarded by the Court, the suspenders had no occasion to apply for relief of such expenses, or to apprehend that the same would be demanded under the denomination of penalties.

And, *3tio*, It is indeed true, that upon reasons for suspending the contract being repelled, decret must have passed, if demanded, for payment of the penalties, as well as of the principal sum and interest, in the precise terms of the contract; because it could not be foreseen what expenses might afterwards be incurred, in doing diligence for recovery of the debt thereby properly due, or whether the charger might not be obliged to adjudge. But such decerniture could not be understood to make the suspenders liable in the actual payment of the penalties, whether diligence of that kind came to be done or not, or to make them liable in the expenses of plea already incurred in discussing the previous question as to the validity of the contract; and as the contract is now implemented, by payment of the principal sum and interest, the penalties must fall of course, as no expense of diligence can be hereafter incurred. Neither is there room for still awarding costs of suit against the suspenders, in respect of the circumstances of the case itself, independent of the conventional penalties, as the suspenders were not litigious, but had at least a *probabilis causa litigandi*; which is proved by their obtaining two interlocutors of the LORD ORDINARY, and one of the whole LORDS, in favour of their plea.

“THE LORDS sustained the reasons of suspension, as to the penalties.”

Act. Macqueen, *Advocatus*.

Alt. Rae.

D. R.

Fol. Dic. v. 4. p. 55. Fac. Col. No 77. p. 132.

1761. November 27.

WILLIAM GORDON, Trustee for KATHARINE and ANNE MAITLAND, *against*
Major ARTHUR MAITLAND of Pittrichie.

No 20.
Penalty in a
bond allowed
only to the
extent of the
expense of
diligence used
in putting
the decree
obtained by
the creditor
in execution.

MAJOR MAITLAND having, by decree of the Court of Session, affirmed in the House of Peers, been found liable to Katharine and Anne Maitland in the sum of 19,000 merks, and annualrent due thereon, contained in a bond granted to them by their brother Mr Charles Maitland, with a fifth part more of penalty in terms of the said bond; he was charged with horning at the instance of William Gordon their trustee, to make payment of the whole.

The Major paid the principal sum and annualrents; but suspended the charge *quoad* the penalty; and *insisted*, That the charger could recover no more of it than would defray the expense of diligence used upon the decree.

PENALTY.

10051

No 20.

Answered for the charger; *imo*, His constituents laid out a more considerable sum than the whole penalty charged for in obtaining a decree of the Court for payment of their provisions; and as in strict law, the penalty in a bond is as much due as either principal or interest, so equity can never interpose further than to restrict it to the neat expenses disbursed, and the damage sustained by the creditor through want of his money at the stipulated term of payment. *2do*, As the words of the decree are express, finding the suspender liable in the sums contained in the bond of provision, with a fifth part more than the said respective sums of penalty, in terms of the said bond; and as this decree was simply affirmed, the suspender must be liable for the whole penalty, unless he can show, that the Court of Session has a power to review the judgment of the House of Peers; and the only remedy now left to him is to apply to that most honourable Court, and pray for an explanation of their judgment in this particular, or for a special reference to the Court of Session to reconsider that part of their interlocutor by which they decerned against him for the penalty.

Replied; The judgment of the House of Peers could not make the decree of the Court of Session broader than it was originally; and though it is common for the Court of Session, in cases of this nature, to decern for the penalties as well as the other sums contained in the deeds to which they are adjected; yet it has always been understood, that the creditor could recover no more out of these penalties than would answer the expenses laid out by him in carrying the decreet into execution; and so it was expressly found in the case of *Young contra Allan, anno 1757, No 19. p. 10047.*

“THE LORDS found the letters orderly proceeded *quoad* the expense of diligence incurred since the decree of the Court of Session; but suspended the letters *quoad* the remainder of the penalty.”

For the Charger, *Wight, Ferguson.* Alt. *Burnet.* Clerk, *Justice.*

A. W.

Fol. Dic. v. 4. p. 56. Fac. Col. No 66. p. 150.

1787. July 25.

JOHN MACADAM *against* CREDITORS of CAMPBELL and COMPANY.

IN the ranking of the creditors of Campbell and Company, Mr Macadam, a preferable creditor in virtue of an heritable bond, followed with infestment, claimed to be ranked for the whole of the penalty therein contained. He had likewise deduced an adjudication on the bond.

Pleaded for Mr Macadam; By the infestment on the bond, the same security is given for the penalty as for the principal sum and annualrents; and therefore it is to be fully exacted; which is an equitable claim, seeing it will do no

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No 21.

A creditor by heritable bond, though infest, can claim the penalty to no greater extent than a personal creditor.

No 21. more than compensate the loss arising to this creditor from the long delayed payments of interest.

Answered ; In the particular case of adjudication, the law allows creditors to rank for the full accumulate sums, including penalties. But heritable bonds are in no other situation than personal, in which the penalty is restricted to the expense actually laid out by the creditor in recovering his money. For the penalties in his adjudication, Mr Macadam may be ranked *pari passu* with the other creditors.

THE LORD ORDINARY found, That Mr Macadam could only be ranked for his principal sum and annualrent, and for the penalty to the extent of the expenses incurred; reserving his claim upon his adjudication. And

THE LORDS adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Alva*. For Mr Macadam, *C. Brown*. Alt. *Blair*.
Clerk, *Robertson*.

Fol. Dic v. 4. p. 56. Fac. Col. No 344. p. 532.

1788. June 19.

WILLIAM ALLARDES against JAMES MORISON and ANDREW MURISON.

No 22.

A creditor having prevailed in a challenge of his ground of debt, at the instance of a third party, who was, however, found not liable in expenses, entitled to recur against the debtor upon the stipulated penalty for payment of such expenses.

MR ALLARDES lent to William Bogie a sum of money, for which, with annualrent and a liquidated penalty, the latter granted an heritable bond over a subject, in which he stood infeft as proprietor, equally with two other persons, James Morison and Andrew Murison; and on the bond infeftment followed.

This right was challenged by Morison and Murison, in an action of reduction*; but sustained after considerable litigation; though it was found, that no expenses were due by the pursuers.

Allardes afterwards brought a process of adjudication upon the bond, in which Morison and Murison appeared; and making offer to pay the principal sum and annualrents, while they denied that any part of the penalty could be exacted, objected to the passing of the adjudication; and

Pleaded; An adjudication is unnecessary when payment of a debt is offered to the full legal amount. Conventional penalties are only exigible as a recompence for the loss of annualrent, or in order to re-imburse the charges of diligence for recovery of the debt; but by no means on account of the expenses of any action which may take place with respect to it; *Fac. Col. 23d December 1757, Allan contra Young and Millar, No 19. p. 10047.* Wherever such expenses are due, it is so found; and thus they are repaid without the aid of the stipulated penalty. In the present case, any demand of expenses, under

* See 8th March 1787, No 11. p. 8335., *vide* LITIGIOUS.

the name of penalty, seems to be even absurd; it having been expressly found, that 'expenses were not due.'

Answered; The pursuer was entitled to have his heritable bond guaranteed to him; and for this end the expenses in question were laid out. He has therefore the same claim to an adjudication for these as for the expense of executory diligence, both the one and the other being necessary for rendering his security effectual, and recovering the debt. It is true, Morison and Murison have been found not liable to reimburse the pursuer; but that does not affect the obligation which lies upon Bogie.

The Lord Ordinary reported the cause; when

THE COURT found, that the pursuer was entitled to an adjudication in security of the penalty in the bond.

Reporter, Lord Hailes. Act. G. Ferguson Alt. C. Hay. Clerk, Gordon.

S. Fol. Dic. v. 4. p. 55. Fac. Col. No 23. p. 39.

1796. May 21.

Mrs JANET YOUNG, and her Husband, against Mrs JANET SINCLAIR,
and Others.

CAPTAIN ALLAN granted Mrs Janet Young an heritable bond of annuity for a certain sum, 'with a fifth part more of liquidate expenses in case of failie.' After his death, a doubt having arisen among his representatives which of them should be ultimately liable in payment of it; Mrs Young brought an action against one class of them, concluding for the arrears due to her, and for punctual payment of the annuity in time to come, 'and one-fifth part more, being the liquidate penalty and expenses, or stated damages arising from the failure in the regular payment of the said annuity, and costs and charges incurred in enforcing payment thereof.'

THE LORD ORDINARY, after hearing parties, "decerned against the defenders in terms of the libel; but, upon payment of the annuities, ordained the pursuers, upon the defenders' expenses, to grant an assignation in the defenders' favour." A decree, in these terms, was afterwards extracted.

Mrs Young having claimed expenses of process under this decree, Mrs Sinclair and the other defenders raised a suspension, in which they contended, that where a Judge, after hearing parties, pronounces a judgment which is silent with regard to expenses of process, none are understood to be given; *L. 3. Cod. De fruct. et lit. imp.*: That where a party extracts a decree, without craving an express judgment on that point, the incontrovertible presumption is, that he was convinced, if he had asked expenses when the Judge was master of the case, they would have been refused; and that this held although the decree

No 23.

A decree *in foro*, 'in terms of the libel,' upon a bond containing a penalty, does not include expenses of process.

No 23. was in terms of a libel concluding for a penalty; 23d December 1757, Young against Allan, No 19. p. 10047.; 27th November 1761, Gordon against Maitland, No 20. p. 10050.

Answered; Whatever may be the case when an action is brought for payment of a debt not secured by a penalty, and the summons contains a random conclusion for expenses, where the document of debt contains a penalty which is concluded for in the summons, a decree, in terms of the libel, must include expenses of process. In other cases they are given because there has been some fault on the part of the defender; but when a conventional penalty is sustained to the extent now claimed, the ground of judgment is, that a party cannot, from considerations of equity, be deprived of the full penalty, which, at strict law, is due to him, without at least being indemnified for the expense incurred by him in making his debt effectual; 4th January 1740, Couper, No 16. p. 10044.; 19th June 1788, Allardes against Morison, No 22. p. 10052.

The Lord Ordinary on the bills reported the cause on memorials.

Observed on the Bench; When a decree is pronounced in terms of the libel, in absence of the defenders, the actual expenses of process are included; but they are not included where the decree is *in foro*, unless they are expressly given.

THE LORDS unanimously remitted to the Lord Ordinary to pass the bill, *quoad* the charge for expenses of the former process.

Lord Ordinary, *Polkemmet*.

For the charger, *Montgomery*.

Alt. *Tod*.

D. D.

Fac. Col. No 218. p. 513.

No 24.

A conventional penalty in a lease, for mismanagement, exacted to the full extent.

1802. February 24. HENDERSON against MAXWELL.

JOHN MAXWELL entered to the farm of Eastertown of Rochelhill, at Martinmas 1781, on a lease for 19 years, from John Henderson, the proprietor, which, among other clauses, contained one prescribing 'the course of labouring during the currency of the tack, and that under a penalty of L. 3 Sterling for 'each acre laboured otherwise than as above, to which the damages are hereby 'estimated, without power to any Judge to modify them on any pretence 'whatever.'

Not having adhered to the mode of management pointed out by the lease, an action was brought by Henderson before the Sheriff of Forfarshire, concluding for the stipulated damages. A proof was allowed, and the defender was 'decerned to make payment of L. 6: 18s. Sterling, being the penalty stipulated by said tack, and incurred by the defender through his not manuring 'and improperly cropping,' &c. He was also found liable for the expense of plea, and the dues of extract.

A suspension of this decree was pleaded (4th February 1800) before the Lord Ordinary, who affirmed the judgment.

In appealing to the Court, the tenant

Pleaded; The conventional penalty should be restricted to the actual damage incurred; Stair, B. 1. T. 10. p. 104. Now, this farm has been all along managed in a most beneficial way for the landlord, so that what was formerly heath, is now producing very valuable crops; yet the tenant is subjected in payment of penalties and expenses, without any damage having been incurred.

Answered; A tenant is liable in damages for every infringement of any stipulation in his lease; and to prevent the tedious and expensive investigation necessary for proving the real damage in such a case, a conventional penalty is here substituted, which ought to be exacted for the reasons which induced its insertion. A penal sum in a bond, over and above performance, it is true, is always restricted to the actual damage incurred, otherwise it would be liable to the objection of usury. But the case is different, where the penalty is inserted as a liquidated satisfaction in lieu of damages, or a fair equivalent agreed to be accepted by the one party, and paid by the other, for departing from the terms of the contract, Principles of Equity, b. 3. c. 2. *Inst. De Verb. Oblig.* § 7. Marshall against Cunningham, 13th December 1780, No 39. p. 9183.

The Court adhered to the judgment of the Lord Ordinary*.

Lord Ordinary, *Cullen*.

Act. *Maconochie*.

Agent, *J. Hanton*.

Alt. *Inglis*.

Agent, *Th. Robertson*.

Clerk, *Home*.

F.

Fac. Col. No 25. p. 49.

* Upon the same principles; the case of Little Gilmour against William Mutter, June 1797, was decided, *see APPENDIX*.

See APPENDIX.

P E N S I O N.

1588. February.

STUART against DOUGLAS.

No 1.

A gift of pension out of a benefice found valid, though it did not take effect by possession during the life of the donor.

COLONEL STUART and Commendator of Pittenween pursued Sir George Douglas, to hear the gift of a pension given by his umquhile brother, James Earl of Murray, forth of the benefice of Pittenween to be reduced. The reason of the summons was, because the said Sir George had never apprehended possession of the said pension before the decease of the Earl his brother, who was the giver thereof, et sic dans et retinens nihil inde ex hac donatione sequitur; and also it was *alleged*, that quemadmodum in feodis feodum absque investitura esse not potest, et in investitura apparet scripto possessio, ead. feudi lex ex investitura, similiter ut ait Bald. ibid. quod similiter in pensionibus, quia omne jus possessoris in possessione dependit; et manifesti juris est pensiones super beneficiis constitutas per possidentem beneficia non adherere beneficio, nec eos qui in eo succedant obligare, sed constituens tantum personam, et non rem ipsam, prout in cap. de prebendis et in jure canonica, non licet personæ pensionem in titulum dare ut in titulo, ut beneficia ecclesiastica sine diminutione conferantur; and so, by reason of the foresaid laws, the disposition of the pension made to Sir George by his brother, then prior for the time, could never oblige the successor, *attento hoc maxime*, that he got never possession during the time of the giver. It was *answered* by Sir George, That he had, conform to his pension and gift thereof, obtained two sundry decrees against the immediate successors of the Earl of Murray, disposer thereof, viz. against Sir James Balfour, then prior, and then against Mr James Haliburton Provost of Dundee, who succeeded after Sir James; and also he had made interpellation against the tenants and feuers, the time of the Earl giver of the said pension, and had obtained protestation against them, as the same was shown in process; and that their apprehending of real possession could not make his pension better or worse; et similitudo illa quæ ducta fuit a feodis et investitura ad pensiones et earundem possessionem non tenet, quia

No 1. feuda transeunt in heredes et non pensiones, et quamvis large sumend. feudum dicitur beneficium et sic pensio potest applicari ad feudum, quia possessio beneficii, non possessio feudi, presente argumentatur, tamen consequens ex præmissis non potest inferri, quia pensio neque beneficium neque pars beneficii ullo modo dici potest, et hoc legibus et juribus prædictis, et nulla ratio neque lex auferri potest prout allegabat. THE LORDS, after long reasoning at the bar, in *præsentia regis*, found the reason of the summons irrelevant, licet magna pars in contraria fuerunt opinione.

Fol. Dic. v. 2. p. 55. Colvil, MS. p. 438.

No 2.

1593. *March.*

HUTCHISON against KERR.

A gift of pension by a bishop, without consent of the chapter, being clothed with possession, found to subsist during the bishop's life.

ANE Bogill in Glasgow raisit multiple-poin ding agains Bishop Erskin, on the ane part, Mr Henrie Kerr, having ane pensoun of twa chalders victuall furth of the reddiest fruittis, on the second pairt, and George Hucheson on the third. Mr Henrie producit his pension, George Hucheson producit ane gift of pension, granted in lyfrent to his father and to himself be Bishop Betoun, be vertue whair of thay had bene in possession thir mony zeirs. Mr Henrie *alledgit*, That notwithstanding thair of, he aucht to be answerit and obeyit, becaus the said gift dispo nit to Hucheson be the Bishop wes null, being set be the Bishop without consent of the chaptour; and albeit it micht have obleissit the Bishop not to run in the contrare thair of in his lyftyme, yet he being *mortuus civiliter*, being forfalted, could not prejugé his successouris, and pairties having rycht flowing fra thame; notwithstanding the whilk alledgeance, the LORDS fand, thay wald not tak away the gift cleid with sa mony zeirs' possession in ane doubill poynding, bot ordainit the said Hucheson to be answerit and obeyit.

Fol. Dic. v. 2. p. 55. Haddington, MS. No 400.

No 3.

1614. *June 30.*

ANDERSON against M'CALL.

IN an action pursued by David Anderson *contra* David M'Call, the LORDS found a pension out of a coal real, and therefore decerned letters for poin ding of the coal, w.n, or to be win.

Fol. Dic. v. 2. p. 55. Kerse, MS. fol. 95.

1622. *June 30.*

No 4.

A Bishop granted a

BISHOP of ABERDEEN against HIS TENANTS, and the LO. DRUMLANRIG'S SON.

IN a double poin ding pursued at the instance of some of the tenants of the bishop-lands of Aberdeen against the L. Corss, being then Bishop, on the one

part, and Douglas, son to the Lo. Drumlanrig, on the other part, either of them claiming right to the duties of the lands, the Bishop as a part of the patrimony of the Bishoprick, and the other claiming the same by virtue of a pension given by umquhile ——— Bishop of Aberdeen, to ——— Douglas of Tofts, during his lifetime, containing power to transfer the same to an assignee at any time in his lifetime, and upon the which pension decret conform was obtained by the pensioner, and continual possession had by him of the duties contracted, which were assigned in the pension for satisfaction of the same; which pensioner, conform to the clause and power of the pension, had transferred and assigned the same in favours of the said ——— Douglas, the other party now complained upon, by a lawful disposition of the same made to him by the space of a year and a half, or two years at most before his decease, and who deceast but by the space of a year at the most before the dependence, after whose decease the said ——— Douglas, to whom the pension was assigned, had intended his action of letters conform, and in respect thereof, he alleged that he ought to be preferred to the Bishop. THE LORDS repelled the pensioner's allegiance, and found the Bishop had right to the duties foresaid, and not the pensioner's assignee, because it was alleged by the Bishop, that the pensioner, notwithstanding of his translation made in favours of this party, had remained in possession of the said pension during his lifetime, and the assignee never apprehending possession, nor making intimation of his right, could not claim the right after his author's decease, which took no effect by possession in his author's lifetime, as said is, nor no intimation being made thereof; which allegiance of want of possession and intimation in the pensioner's lifetime, the LORDS found relevant to cause the assignation become simulate and extinct; albeit it was *answered*, That the want of possession could not make a right which was lawful of itself, and which was made by one having power to make the same (and whose power was confessed by the party) to fall, seeing the pensioner, or his executors, would be countable to the party defender for the duties uplifted and possest by him ever since he was denuded; which was repelled by the LORDS, and the Bishop's allegiance found relevant, as said is.

Act. Nicolson sen. et Lermontb.

Alt. Nicolson jun. et Mowat.

Clerk, Scot.

Fol. Dic. v. 2. p. 55. Durie, p. 27.

* * Haddington reports this case :

IN a double-poining, the Bishop of Aberdeen, and Douglas, son to the Laird of Drumlanrig, being parties, Douglas *alleging*, That he should be answered and obeyed, because he was assignee constitute by umquhile Archibald Douglas of Tofts, to a pension of L. 500, furth of the Bishoprick of Aberdeen, granted *anno 1575* to Tofts, *cum potestate transferendi*; it was *answer-*

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No 4.
pension out of his patrimony during the pensioner's life, with power to assign at any time before his death. The pensioner assigned two years before his death, retaining possession. The assignee claimed after the pensioner's death. The Lords preferred the Bishop's successor on act 139. Parl. 1592, there having been no intimation.

No 4.

ed, That his assignation was null, because it was granted to him in *anno* 1618, whereof he never made intimation, obtained possession nor letters conform, but the cedent retained possession three years after the assignation, to the time of his decease; and therefore the assignation was simulate and null, proceeding from him *qui dedit et retinuit*.

Haddington, MS. No 2640.

1623. February 27.

PAIP against L. WOLMET.

No 5.

IN an action of suspension betwixt Mr John Paip and the L. of Wolmet, for payment of a pension of diverse loads of coals given to Mr John Paip; the LORDS found, that the granter of the pension, nor his heirs, were not obliged to carry the coals to the dwelling-house of the pensioner, where the pension bore not the same *specificce*; but that it was sufficient to the granter of the pension, and his successors, addebted therein, to deliver the same at the coal-hill to the pensioner, to be transported upon his own charges where he pleased to carry the same; and that sicklike in other pensions of that nature and quality, as of victual, that the pensioner ought to carry the same from the barn door and ground of the land upon his own expenses, and that the granter is not obliged in the said carriage, except the pension be so expressly granted, and no otherways.

Act. McGill.

Alt. ———.

Clerk, Hay.

Fol. Dic. v. 2. p. 56. Durie, p. 537.

* * Haddington reports this case :

1623. February 28.—MR JOHN PAIP having a pension of four bolls meal, and two dozen loads coals, to be paid to him yearly by the Goodman of the Wolmet, pursued him to lay them in to him in his house in Edinburgh. Wolmet *alleged*, That he should not carry them, but only pay them. THE LORDS found, that since he was only bound to pay them, he could not be compelled to lay them in, but only pay them on the coal-hill.

Haddington, MS. No 2793.

No 6.

A prelate granted a pension out of his patrimony, not only *cum potestate transferendi etiam*

1625. July 23. MINISTER of KIRKLISTON against WHITELAW.

IN an action betwixt the Minister of Kirkliston and Patrick Whitelaw, a pension being granted by the umquhile Bishop of St Andrew's to Mr John Arthur, Commissary of Edinburgh, *cum potestate transferendi etiam in articulo mortis*, with power also to that assignee, to transfer the same at any time, be-

fore that assignee's death, in the person of any other, who should also bruik the same, during the lifetime of him, who should receive the last translation ; which pension being transferred by umquhile Mr John Arthur before his decease, in favours of his wife, and she having transferred the same in favours of her son ; who pursuing letters conform to the said pension ; the Bishop of St Andrew's compearing, and alleging the nullity of that pension, as being given in prejudice of the successors of the granter thereof, and in diminution of the rental of the benefice, and to the hurt of the kirk ; this allegiance was repelled, and the pension sustained.

Act. Hope.

Alt. Mowat et Primrose.

Clerk, Gibson.

No 6.

is articulo mortis, but with the same power to the assignee. This pension, though given in prejudice of the successors of the granter, and in diminution of the rental and hurt of the kirk, was sustained.

In this above written process of Patrick Whitelaw, there was produced for the minister of Stow, a decret given by the Commissioners of Parliament, appointed for modification of the minister's stipends, conform to the act of Parliament *anno* 1617 ; by the which decret, the foresaid pension of L. 100, granted to the said Mr John Arthur, *cum potestate transferendi*, as said is, was appointed to remain with Mr John Arthur during his lifetime, and after his decease, so much of the said pension as was paid out of the parish of Stow, viz. L. 50 thereof, was ordained to be paid to the minister of Stow, for a part of his stipend in all time coming ; which decret being quarrelled by Patrick Whitelaw assignee foresaid, as null, because before that sentence, the said Mr John Arthur had transferred his right of the said pension to his wife, he being obliged to do the same to her, by an express clause contained in the contract of marriage made betwixt them ; and so she not being called to that sentence, who was a party hurt thereby, and having right to the said pension, the said decret could not be sustained ; especially seeing the Commissioners, givers of that sentence by the act of Parliament, which was the warrant of their proceedings, had no power granted to them to take any man's right from him : Which allegiance was repelled, in respect Mr John Arthur the husband was called, and compeared in that decret ; and the LORDS finding that this was a decret of Parliament, they thought themselves not Judges to annul a sentence of Parliament so summarily by way of exception.

Fol. Dic. v. 2. p. 55. Durie, p. 180.

1628. December 17.

CHALMER against L. CRAIGIEVAR.

THERE was a pension granted by Patrick Abbot of Lindores to Mr William Chalmers out of his abbacy, for Mr William's lifetime, with power granted to him to make assignation of the said pension *in articulo mortis* to any he pleased. Mr William assigneth the pension to his son three years before his decease, but remained in possession thereof all his lifetime ; and after his decease, his son enjoyed the same, by virtue of the same assignation, for the space of thirty

No 7.

Found in conformity with Bishop of Aberdeen against his Tenants, No 4. p. 1005.

No 7. years and more. This pension being called in question, in a double poinding raised by the tenants against the pensioner on the one part, and Craigievar on the other; the LORDS would not sustain the assignation, in respect that the cedent remained still in possession, *et sic dans et retinens*.

The reason why this former assignation was not sustained was this, because the entry thereto was referred to the time of the cedent's decease, which the Lords thought no ways lawful. But in another action of the self same nature, pursued by the Bishop of Aberdeen against William Douglas son to the Laird of Drumlanrig, assignee to a pension out of the bishoprick of Aberdeen, granted to the umquhile provost of Lincluden, the assignation was found null, because the cedent remained still in possession till his decease. (No 4.)

Fol. Dic. v. 2. p. 55. Spottiswood, (PENSION) p. 228.

* * Durie reports the same case :

IN a double poinding, Chalmer against Craigievar, for the feu-duty of certain lands held of the abbacy of Lindores, which were claimed on the one part by him who had the right of erection of that benefice, and on the other part, by a pensioner of the abbot's, to whom these feu-duties were specially assigned, for payment of the pension, the pension being granted to the pensioner for his lifetime, *cum potestate transferendi in articulo mortis*, and to endure for the lifetime of that assignee; and the pensioner having transferred the same in the assignee, three years before his decease, and the translation appointing his entry to be immediately after his decease, the cedent's self retaining possession after his translation, all the time of his lifetime: THE LORDS found the translation null, because it was made to the assignee, as said is, to begin after the cedent's decease, and so was conferred to an unlawful time of entry, at which time it could not have beginning; for it was found, that it should have been conferred to a time, which should have begun to the assignee, in the cedent's own lifetime before his decease; neither was it respected which was alleged by the assignee, That seeing the pensioner had power to transfer *in articulo et ipso momento mortis*, which if he had done, the assignee could not have had thereby an effectual entry, but after his decease, that therefore the translation to begin immediately after his decease was alike, and could not make it null therefore; and also he alleged, that the assignee, since the cedent's decease, had both a decret of letters conform standing, and also conform thereto had been thirty years in possession, so that in this possessory judgment, his right, after so long time, could not be summarily annulled; which allegiance was repelled, and the assignation found null, because the beginning thereof was not at a time before the decease of the cedent. In this process, the principal pension being quarrelled, because conform to the act of annexation 1587, it was not clad with possession or sentence before that act, as is thereby required, and as is provided by the acts of Parliament 1592 and 1594, which acts declare pensions null.

out of benefices and kirk-lands, not authorised with sentence or possession before the year 1587; the LORDS found, that either decret or possession of the pension ought to be alledged, (if it should be sustained) before that year 1587. And because the pensioner alleged his possession of a part of the pension out of the duties assigned of a term before that year, the same was sustained, and it was not found necessary to allege possession of the whole pension, and of more years before that year; and this possession of one part, viz. that one part of the feu-duties assigned for the pension was paid to him, was found probable by witnesses, without necessity to prove the same by discharges or writs; and also the feu-duties of the pensioner's own lands, being assigned to himself by the pension itself, in satisfaction of the pension *pro tanto*, his retention thereof in his own hands, was sustained as a sufficient possession; neither was it found necessary that the pensioner should be compelled to say, that he had possession of the whole pension before the year 1587; for the possession of one part thereof was found sufficient to sustain the pension for the whole, and to exclude the nullity objected by the acts of Parliament foresaid. See PROOF.

Act. *Advocatus & Nicolson.*Alt. *Stuart & Baird.*Clerk, *Scot.**Durie, p. 419.*

1629. July 9.

URQUHART against E. CAITHNESS and DICK.

No 8.

A PENSIONER to the Earl of Caithness having the duties of lands assigned in his pension to him; for satisfaction whereof, having obtained a decret and letters conform against the Earl, granter thereof, and against the tenants of the lands assigned, and conform thereto being diverse years in possession of the duties from the tenants; thereafter the lands being comprised from the heritor granter of the pension, which comprised was infest by public infestment, and in possession of the duties of these lands assigned, and he being convened by the pensioner for payment of the said duties to him the years intromitted with by the comprised; it was found, the said comprised was not holden to restore the same, and that the said pension being granted by a laick, and not by an ecclesiastical person, was not real, and did not affect the ground against a singular successor, but would only produce personal action or execution against the granter's self and his heirs, for the years since he was denuded of his heritable right by comprising and infestment.

Act. *Nicolson.*Alt. *Stuart.**Fol. Dic. v. 2. p. 55. Durie, p. 459.*

No 9.

Import of act
101, Parl.
1581, relative
to pensions to
beneficed per-
sons.

1631. February 23.

L. FREELAND *against* MURRAY.

L. FREELAND, as having right to a pension of a chalder of victual, granted by the Provost of Methven, with consent of the prebendaries, and of the Duke of Lennox, patron of the benefice, to Mr John Moncrieff, and which was assigned by him to umquhile L. Freeland, to whom this pursuer was heir; and as heir having so right, pursuing one Murray as intromitter with the teinds of the lands of Tassoquhy, which were specially assigned by the pension, for payment of the same; after inhibition served upon the said teind-sheaves, pursuing them as intromitters therewith, for payment of the years 1628 and 1629; and the defender having acquired from the new provost of Methven a tack of these teinds, being the teinds of his own lands, and by virtue thereof being diverse years in possession, alleging that this pension was null, because by the act 101. Parl. 1581, all pensions set by beneficed persons under prelates, in diminution of the rental, and to the hurt of their successors, are null; and this was of that nature; and the pursuer *replying*, that the act meant only of pensions granted by inferior beneficed persons, which were at the King's presentation, and extended not, nor meant not of benefices at the presentation of laick patrons, as this was: THE LORDS would not decide this while they were further advised, seeing it tended to annul all pensions, and whatsoever deeds done by inferior beneficed persons, as well tacks as other rights; for by setting of tacks the successor was also prejudged, and the rental of the benefice diminished. And albeit it might appear, that this act could not receive so large extent of interpretation; for thereby a provost, albeit with consent of the chapter and patron, might neither set tack nor give pension; and by the said act, there cannot be any pension which may subsist, but all are unlawful; notwithstanding that by the act of annexation, pensions set by inferior beneficed persons, clothed either with decret or possession, are excepted therefrom; and by the 62d act of the 11th Parliament 1587, it is evident also, that some such pensions are lawful and valid; for if all were null, as the act excepted upon bears, these other acts made *anno* 1587 were needless, and would never been made; likeas by the act 1594, tacks set for longer space than three years, without consent of the patron, are null: Yet the Lords were almost all of one mind, that by the foresaid act the pension was null, but it was not voted as said is; and they thought this nullity might be received, by way of exception, without pursuit of reduction, and was receivable being proponed by this tacksman, whose tack, albeit the pursuer alleged it was also set to the hurt of the benefice, and so had the same fault which his pension had; yet the Lords thought it was good enough to maintain the possessor, being a tack of the teinds of his own lands, and would defend against the setter, who so long as he lived, could not quarrel his own deed. Neither was it respected, that it was only now questioned betwixt the prior pensioner, whose pension was also clothed with diverse years possession, and the posterior tacksman; and that

the pursuer replied, that the beneficed person had only place to quarrel his right, and that not summarily, but by pursuit of reduction, seeing it was clothed with possession; in the which action he might then qualify, (which is not proper to be done here) that there is no diminution of the rental; and where he would dispute, that the rental is not to be considered, according to the avail and rent of the benefice, as it may yearly yield, but according to a constant recorded rental in writ, given up and authorised for a rental; likeas he would then allege great difference betwixt pensions flowing from a stipendiary minister or titular, and a beneficed person, having patron and chapter consenting to his deed, and which is *ecclesia collegiata, habens capitulum et præbendam cum dignitate*; but this was not decided as said is.

Durie, p. 574.

1662. July.

CLAPERTON *against* LADY EDNEM.

No 10.

A pension of victual out of lands, made by a laick, was found no real right, but a personal obligation, not binding upon singular successors.

UMQUHILE John Edmiston of Ednem gives a pension to Jean Stirling of two bolls wheat and ten bolls oats, payable yearly out of the mains of Ednem, whereunto George Claperton her son being assignee, pursues the Lady Ednem and the tenants for payment, from crop 1647 to 1661 inclusive. It was *alleged* for the Lady, She stands infest in the mains, and by virtue of her infestment, in possession, continually since the death of her husband: And the pension is no real right, especially being granted by a laick, and whereupon never any decreet followed against the tenants. It was *answered*, That the pension was clad with possession by payment made by her husband in his time, and by the defender herself for the year 1647. It was *replied*, That the pension is but a personal obligation by which the defunct did oblige him and his heirs to pay the same out of his rents of the mains; which personal obligation cannot carry a real right as an infestment; and any payment made by the defunct was only for fulfilling his personal obligation: Likeas, the payment made by the defender was as executrix, for fulfilling her husband's obligation, out of his moveables, which cannot be a ground to affect the rents therefore.

THE LORDS found the allegiance and reply relevant.

Fol. Dic. v. 2. p. 55. Gilmour, No 52. p. 37.

* * * Stair reports the same case :

1662. December 11.—IN anno 1621, umquhile Sir John Edmiston of Ednem granted a bond of provision to Jean Stirling of two bolls of victual, which he obliged himself to pay to her out of the mains of Ednem, or any other of his lands, by virtue thereof she was in possession, out of the mains of Ednem, till the year 1640. Andrew Claperton her son and assignee pursues the Lady Ed-

No 10.

nem, as intromitter with the rents of the mains of Ednem, to pay the pension since. The defender *alleged*, Absolvitor, because she stands infeft in the mains of Ednem, by virtue of her liferent, and thereupon has possessed; and the pursuer's pension is merely personal, and does not affect the ground, nor is valid against singular successors, and though conceived in the best way, can have no more effect than an assignation to mails and duties, which operates nothing against singular successors, unless it had been an ecclesiastical pension, clothed with possession, having letters conform, which only is valid against singular successors.

THE LORDS found the defence relevant.

Stair, v. 1. p. 148.

If a pension falls by failure of the cause for which it was granted.—See IMPLIED CONDITION.

A pensioner dying, what interest his executors have.—See TERM LEGAL AND CONVENTIONAL.

See APPENDIX.

P E R I C U L U M .

S E C T. I.

Periculum Rei Venditæ.

1667. December 13.

HUNTER against WILSONS.

HUNTER having charged Wilsons for payment of 500 merks contained in their bond, they suspended on this reason, the bonds bears expressly, that the same should not be paid till the suspender be put in possession of a tenement of land in Glasgow, for a part of the price whereof the bond was granted; *ita est*, they neither were nor can be put in possession, because the house was burnt in the conflagration in Glasgow. It was *answered*, *Non relevat*, because after perfecting the vendition *periculum est emptoris*, and therefore this being an accidental fire, wherein the seller was no ways in *culpa* nor in *mora*, in respect, that at that time there was a liferenter living, whose liferent was reserved in the disposition. It was *answered*, That albeit in some cases the peril be the buyer's, yet where there is an express obligation, that no payment shall be until possession, by that express paction payment cannot be sought. It was *answered*, That the buyers had taken possession after the burning, and had built the house. It was *answered*, That the possession of the ground cannot be said the possession of the house; *terra non est domus*; and therefore, this being but a small part of the price, in such a calamitous case the suspenders ought to be liberate thereof.

Notwithstanding of all these allegiances, the LORDS found the letters orderly proceeded. Here the buyer was infeft before the burning, and did voluntarily take possession after the burning.

Fol. Dic. v. 2. p. 56. Stair, v. 1. p. 493.

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No 1.

A house being bought, and thereafter burnt, the damage was found to fall on the buyer.

No 2.

1685. February.

AITCHISON against DICKSON.

IN the action February 1684, Aitchison against Dickson in Kelso, *voce* SUPERIOR AND VASSAL, the house in controversy being burned, the LORDS found, that the dominion and property being transferred to Aitchison, in respect he was infeft, and that the keys of the house were offered, that therefore the loss and prejudice by the burning, which was accidental, must follow Aitchison the buyer, who was a proprietor of the tenement; albeit there was a part of the price not paid, there being a difference about it that was referred to certain friends to be determined, which was not determined the time of the burning.

Fol. Dic. v. 2. p. 56. Sir P. Home, MS. v. 2. No 700.

No 3.

1687. February 25.

SPENCE, &c. against ORMISTON.

A TEIRCE of brandy was to be delivered at a merchant's shop in Edinburgh, but was seized as run goods, so that the buyer was constrained to redeem it by paying treble excise. In the question on whose peril the brandy was, the LORDS found, that it was on the seller's, he being obliged to deliver it in the buyer's shop in Edinburgh.

Fol. Dic. v. 2. p. 56. Fountainball.

* * * This case is No 6. p. 3153. *voce* DAMAGE AND INTEREST.

No 4.

1711. June 13.

BEATRIX LINGCLATER against BOSWELL.

A person, altho' not proprietor, yet being *creditor speciei*, was found obliged to bear the accidental loss of the subject.

By contract of marriage betwixt Captain Boswell in Kirkaldy and Beatrix Lingclater, he having got several shares of ships and other considerable moveables by her, obliged himself to add to what he had got with her, the sum of of his own proper means and estate, and to take it to him and her in liferent and conjunct-fee; and she pursuing on the contract for having a sum filled up in the blank, it being by simplicity and ignorance omitted in her husband's lifetime, *qui non debet lucrari ex sua culpa*; alleged, That the very principal contract produced by herself *in modum tituli* is not only blank, but is scored; which clearly evinces that she and her friends have passed from it; especially seeing she is largely provided without it, a posterior clause bearing, that in case of no bairns (which case has existed) the half of her tocher is to return to herself, so she is at no great loss. *Answered*, If they have imposed on her weakness by scoring it, yet that can never deprive her of the *arbitrium boni viri*, which comes in place of the parties contractors, who certainly meant.

some provision by that clause ; for *verba non debent esse otiosa, sed aliquid operari* ; and therefore the Lords may insert such a sum as was suitable to the husband's circumstances and estate ; for to think I would subscribe a contract without some equal compensation on my husband's part, were to declare me a fool with a witness. *Replied*, The clause being blank and scored, must of necessity presuppose to have been done of consent, unless she can prove it done *viis et modis* indirectly ; and it is without the Lords power to make up a new contract here, more than in the case where parties have forgot to insert a clause at whose instance execution shall pass, the Lords, though applied to, never ventured to supply it. Some thought that a small and moderate sum might be decerned, the Lords being sensible that it was a mere oversight and neglect on her friends part. Yet this being a stretch to supply so great a defect, they found the blank in the contract, not being filled up in Captain Boswell's lifetime, and the same being now produced by the defender herself, and found scored, his heir was not liable in payment of any liferent upon account of the said blank clause now scored.

Then she *insisted* for the value and price of her share in Balfour's ship, which she had in her contract assigned to her husband, but with this quality, That in case of no children she should have the fee of the half, and liferent of the whole ; and therefore craved her husband's heir might be decerned in a sum for her part of that ship, seeing she had her election to take herself either to the goods disposed, or their price. *Alleged*, She had exhausted and declared her option already, and so could not alter now, nor recur to his prejudice ; for she had taken herself to the ship itself, in so far as, after her husband's death she had subscribed the ship's compt-book, and took in her proportion of the balance of the profits, and signed a commission to Robert Todd to navigate the ship as skipper ; and that in his first voyage the ship was accidentally burnt at Harwich, and so being lost *casu fortuito* it must fall upon her ; seeing *res unaquæque perit suo domino*. *Answered*, Her contract fully divested her of the property of the ship, so that her husband could have sold it, and his executrix could have done the same, so it must perish to them and not to her ; and the deeds condescended on noways prove her election of the ship rather than the price ; for *per eam non stetit* but you might have sold it, in which case I would have got the half of the price, and the liferent of the other ; and my necessary deeds of administration did not hinder you, and your delaying till the ship perished must prejudge yourself and not me. THE LORDS found, though she was not proprietor, yet being *creditræ speciei*, and that individual species perishing, the loss must fall upon her ; and that neither her husband's heir nor executor was bound to make it up ; but there being some remains of the wreck preserved after the burning, she might claim a share in these. If the ship had not perished, there had been no place for this debate ; but the general rule of law

No 4. in these cases is ejus est periculum cujus est dominium : Qui habet commodum æquum est eum etiam pati incommoda rem ipsam sequentia.

Fol. Dic. v. 2. p. 56. Fountainhall, v. 2. p. 644.

*** Forbes's report of this case is No 11. p. 5017. *voce* GENERAL ASSIGNATION

1744. July 6.

DANIEL M'DONALD, Supervisor of Excise in Montrose, *against* ROBERT HUTCHESON, Merchant there.

No 5.

A bill was granted for goods bought but not delivered; the purchaser allowing them to remain some time with the seller. They perished during that time; but the bill was found due.

ON the 7th June 1743, the charger exposed a quantity of spirits to sale, which was purchased by the suspender, as the highest offerer at the roup, who immediately gave his bill for the price. Next day when he demanded delivery, the charger told him, that the custom-house of Montrose had been broken open the night before, and the spirits, which was lodged there, carried off; and that after the sale, he did not consider himself answerable therefor. Hutcheson, being charged for payment of the bill, suspended, and *pleaded*, That as the same was granted for the price of the spirits which was not delivered to him, it would be against the principles of equity to make him liable for the price, when the thing sold had perished by no fault of his, or any delay on his part in demanding delivery; for as it was past custom-house hours, on the evening of the 7th June, when the sale was, he could not have got out the spirits that night: That whoever brings his action on a mutual contract, must lay it on this, that that he has fulfilled his part; and as a contract of sale is a mutual contract, and a contract *bona fide*, there is nothing in the law of Scotland to difference it from the general rule of equity, which is received in all mutual contracts. When the seller sues for the price, he ought to show that the subject sold is delivered; and if it cannot be delivered, the obligation for payment of the price is dissolved. If, indeed, the subject sold perishes, without the fault of either party, which sometimes may be the case, then each should bear his own loss; the seller has no action for the price, and the buyer possibly may have none for damages. It is true, the Doctors of the civil law have pretty generally laid it down for a rule, That, by the sale, the risk of the subject sold is transferred from the seller to the buyer; and that if it perishes before delivery, it perishes to the buyer; though at the same time some of the greatest authorities are of a contrary opinion; in particular, Cujacius ad l. 33. in locat. But whatever be the civil law in this matter, it is believed, it was never received to be the law of this country, that, by the sale alone, the risk is transferred from the seller to the buyer, as is observed by Lord Stair, lib. 1. tit. 14. § 7.

adly, Suppose the general rule stood so, yet as the time of sale was after the

custom-house hours, when the seller could not have made tradition till the next day, the intervening risk in this case ought not to lie on the buyer.

No 5.

Answered for the charger; That the risk of the thing sold lay upon the buyer, after the sale was completed and the price paid; or, which is the same thing, a bill granted therefor. Neither was there any ground in equity, upon which the suspender could be relieved in this case, as the spirits were ready instantly to be delivered upon the sale; and were it necessary, the charger could prove, that the suspender could have got the spirits out of the custom-house, and a permit with them, the moment after the sale was completed; and that his delaying to take them away, was only for his own conveniency, in respect he had purchased the spirits for another (as he gave out) who was not in Montrose at the time.

In the *next* place, In the course of this process, the suspender referred the onerous cause of granting the bill to the charger's oath. In consequence whereof, he deponed, that it was granted for the said spirits, and that he had no further risk of them, than the hour he received Hutcheson's bill; and that he told the suspender, immediately after the sale, he would have no further trouble of them; and that next day when he demanded payment of the bill from the suspender, he said he would pay it in a little time. From all which it is plain, the bargain was completed the time of the sale, and the risk transferred, whereby the charger had no further concern with what afterwards happened; and that the breaking open the custom-house, and carrying off the spirits by thieves, was an accident which cannot affect the suspender, and afford him no sufficient ground to be freed from payment of the price.

THE LORDS found the letters orderly proceeded.

Fol. Dic. v. 4. p. 56. C. Home, No 270. p. 436.

1748. July 15.

CAMPBELL against BARRY.

DUNCAN CAMPBELL drover, upon the 16th December 1745, sold and delivered 58 cows then going in the inclosures of Kilsyth, whereof he was tacksman, to William Barry of Balshannan, and got bill for the price payable at Candlemas thereafter; and the cows were allowed to remain in the inclosures for some short time till Barry should dispose of them.

Barry being charged upon this bill at the instance of Hugh Campbell indorsee in trust for said Duncan, suspended on this ground, That Patrick M'Doual, who had the charge of the inclosures, as servant to Duncan Campbell, and under whose care and keeping the said cattle were, had informed a party of the rebels of them, conducted them to the ground, and assisted them in carrying off 26 cows which then remained undisposed of; that the charger was answerable for said trespass of his servant, and that the suspender ought to have allowance of the value of the 26 cows out of the sum in the bill.

No 6.

The fault of a servant found not chargeable on the master, although goods in his custody, belonging to another, are lost by means of the servant.

No 6.

This reason of suspension "the LORDS repelled, and found the letters orderly proceeded."

They were of opinion, that the charger would not have been answerable for the fault of his servant, though he had knocked the cattle in the head; the cattle were allowed to remain as a favour to the buyer, and the *dolus* of the servant was *casus fortuitus* as to the master.

Fol. Dic. v. 4. p. 57. Kilkerran, (PERICULUM.) No 3. p. 377.

*** D. Falconer reports this case :

DUNCAN CAMPBELL, tacksman of the parks of Kilsyth, sold, December 1745, 58 cows to William Barry of Balshannan, upon his bill for the price, allowing them to continue in the parks, which they did, till the beginning of January, when 26 of them were carried away by the rebels, conducted by Patrick Macdouall servant to the tacksman.

Hugh Campbell writer in Edinburgh, indorsee to the bill, charged thereon, and it was suspended, for that the cattle being in the drawer's custody, were taken away by the fault of his servant, for whom he was liable.

Answered ; The cattle being allowed to continue gratuitously in his parks for the buyer's conveniency, he was not liable for custody, nor to make up that theft of his servant, more than if he had taken cattle out of any other park in the neighbourhood.

THE LORD ORDINARY, 6th June 1747, " Found that Patrick Macdouall was at the time attending the parks at Kilsyth, as servant to Duncan Campbell, and was accessory and assisting in carrying off the cows, and found Duncan Campbell liable for his servant."

On bill and answers,

THE LORDS found the seller not liable. See REPARATION.

Act. H. Home.

Clerk, Gibson.

D. Falconer, v. 1. No 277. p. 372.

No 7.

*Periculum rei
vendita est
emptoris.*

1749. January 31.

MELVIL and LIDDEL against ROBERTSON.

MELVIL and Liddel farmers, bought a quantity of barley and oats from Robertson of Eyemouth in the year 1745, at 12 s. the barley, and the oats at 10s. 8d. the boll; and by the bargain, the seller was to deliver the victual at the Salt Pow in Carron water, free of all charges and risk. Accordingly the ship arrived at the port on the 27th of March; but having met with a storm, 91 bolls of the oats were somewhat damaged, which therefore the buyers were not obliged to take, as the seller run the sea-risk; nevertheless, they took them off the hand of John Kincaid, to whose care the seller had directed them, not

at any settled price, but upon an obligation to hold compt to the seller for the same.

No 7.

A difference arising between Robertson and the buyers about these 91 bolls of oats, he brought a process against them for L. 5 Scots for each boll thereof, which they did not controvert to be the value. But their defence was, that out of the said L. 5, they ought to have deduction of the damage they had sustained by the oats not coming safe, in which case they would have gained the the difference between 10 s. 8 d. the stipulated price, and L. 7 : 10 s. Scots, at which they could have sold them. And so the ORDINARY "found," in respect as his interlocutor bore, "That if the whole victual had perished, the seller would have been liable in the buyer's damages."

But upon advising petition and answers, the LORDS "Found no damages due to the buyers."

The notion the Ordinary had conceived of the matter was, That the seller was bound effectually to deliver the victual to the buyers free of damage, so as to make good to the buyers whatever loss they might sustain by the not delivery. But the Lords had a different notion of it; they considered, that as by the Roman law, so by ours, *periculum rei venditæ est emptoris*, and who therefore, if the thing sold perish *casu*, must nevertheless be liable in the price; as a few years ago was found in the case of spirits robbed from the custom-house of Kirkcaldy, the night after they had been sold and bill given for the price, which nevertheless the buyer was found obliged to pay; (No 5.) and they considered the seller's undertaking the risk in this case to have meant no more than that the buyers should be free of the risk, and not be liable, unless the cargo should arrive safe.

Fol. Dic. v. 4. p. 57. Kilkerran, (PERICULUM.) No 5. p. 378.

* * D. Falconer's report of this case is No 42. p. 2289. *voce* CLAUSE.

SECT. II.

Periculum rei Locatæ et rei Commodatæ.

1624. June 29.

MOFFAT against MOFFAT.

No 8.

WHERE a stabler pursuing for the price of his horse and profit, it was *alleged*, That the defender conducted the pursuer's horse to Falkirk, and he failed in riding and sat about Corstorphine, so that the defender was forced to go to Fal-

- No 8. kirk on his foot, where he offered the pursuer his horse; and it is not libelled what wrong he did to the horse; *replied*, He fode him extraordinary, by galloping him, and rode further than condition to Dumblane, being only hired to Stirling: Found relevant.

Clerk, *Durie*.

Fol. Dic. v. 2. p. 57. Nicolson, MS. No 327. p. 228.

1626. November 28.

— against MOWAT.

No 9.

IN an action for the price of a horse, pursued at the instance of a stabler in Edinburgh, against James Mowat writer, the LORDS found that the defender was subject to pay the price of the horse hired by him, and not restored again; albeit he *alleged*, That he ought not to be found subject therein, in respect that he having hired his horse to a part agreed upon, he was not holden nor astricted to keep him, but the pursuer ought to have sent for his horse again, or to have sent any boy with him to have brought him back, which not being done, but the horse having strayed away, or being stolen by the defender's fault or knowledge, it cannot be imputed to him; which exception was repelled, for conductor equi, of the law; non tenetur ad estimationem, si equus per casum moriatur sine culpa sua, et quamvis de casu non teneatur, tamen de culpa teneatur etiam levissima, ut est in Bart. ad Leg. Si ut certo. §. Nunc videndum, et § Sed interdum D. Commodat. Et conductor rei mobilis retinendo ultra tempus, non videtur reconducere, imo tenetur fur.

Fol. Dic. v. 2. p. 57. Durie, p. 238.

1667. November 16.

WHITEHEAD against JOHN STRAITON.

No 10.

The proprietor of inclosures having put up a placard, that he was not to undertake the hazard of the cattle in them, was found not liable.

WHITEHEAD of Park pursues John Straiton for restitution of a horse which he delivered to his servant, to be put in the park of Holyroodhouse to the grass, and which now cannot be found. The defender *alleged*, That he was liable for no loss or hazard, because at that time, and long before, there was a placard fixed upon the port of the park, that he would be answerable for no hazard or loss of any horse put in there, by stealing or otherwise, which was commonly known at, and long before that time. It was *answered*, That this action being founded upon the common ground of law, Nautæ, caupones, stabularii, ut quæ receperint restituant, the same cannot be taken away but by paction; and the putting up of a placard is noways sufficient, nor was it ever shown to the pursuer. The defender *answered*, That the pursuer having only delivered his horse to his servant to be put in the park, without any express communing or conditions, it behoved to be understood on such terms as were usual with others, which were the terms expressed in the placard.

Which the LORDS found relevant, unless there had been a special agreement, in which case, they found the defender, or his servant, should have shown what was in the placard.

No 10.

Fol. Dic. v. 2. p. 56. Stair, v. I. p. 487.

* * * Dirleton reports this case :

1667. November 14.—ROBERT WHITEHEAD of Park pursued John Straiton tacksman of the park of Holyroodhouse, for the price of a horse put in the said park, to be pastured for four shillings per night, which after search cannot be found.

It was *alleged*, That by a placard affixed upon the gate of the park, it was intimated, that the keeper of the park would not be answerable for any horses put therein, although they should be stolen, or break their neck, or any other mischief or hazard should overtake them. It was *replied*, That by the law *nautæ caupones*, &c. the keeper *ex conducto* is liable, unless it were alleged, that it had been expressly agreed that he should not be liable ; or at the least, that it was known to the pursuer, that such a placard was affixed when he put in his horse.

THE LORDS, before answer, ordained the Reporter to enquire, and hear the parties upon the terms of the agreement, when the horse was put in, whether it was told or known to the pursuer, that the keeper would not be answerable.

Reporter, *Cattlehill*.

Dirleton, No 124. p. 43.

1668. November 17. WILLIAM DUNCAN against The TOWN of ARBROATH.

No 11.

WILLIAM DUNCAN, skipper in Dundee, having lent the Town of Arbroath three cannon, in June 1651, to be made use of for the defence of their town against the English, got from the Magistrates of Arbroath a bond of this tenor, that they did acknowledge them to have received, in borrowing, three guns, and obliged them to restore the same within 24 hours after they were required, without hurt, skaith, or damage ; and in case of hurt, skaith, or damage to be done to them, obliged them to make payment of the sum of L. 500, as the price agreed upon for them. Upon this bond William Duncan pursues for the price : It was *alleged* for the Town of Arbroath, Absolvitor ; because the cannon were lost, *casu fortuito et vi majori*, in so far as the English, after they had overcome the whole country, and taken Dundee, did seize upon their cannon, after the defenders had carried them the length of Barri-Sands, before they were taken, and chased back again by the English ships, and thereupon buried the cannons in the sand, within the sea-mark, and hid the carriages in

The Magistrates of a town borrowed some cannon, which they obliged themselves to restore, free from hurt, skaith, or damage. They were taken by an invading enemy. The magistrates were not found liable.

No 11. a laigh cellar, wherein they were covered; and it being clear by the tenor and nature of the bond, that the guns were received in borrowing, and that it was *contractus commodati*, or loan; which, by the consent of all Lawyers, does not put the peril of *vis major*, or *casus fortuitus*, upon the borrower, but upon the lender, who is *dominus et res perit suo domino*: The pursuer answered, first, That, albeit by the nature of *commodatum*, the borrower hath not the peril, yet the law makes this exception, *si commodatum sit estimatum*; in which case, the peril is the borrower's, and it is no proper loan, but rather sale; which is clear, *l. 5. D. Commodati*; but, by this bond it is evident, that it is *commodatum estimatum*, and here not only a value agreed upon, but a sum expressly declared to be the price; 2dly, There is no question but loan may consist with that, that the borrower will undertake all peril: *Ita est*, By this bond the defenders are obliged to restore, without hurt, skaith, or damage, which must import all perils, especially such perils as were then imminent; viz. the taking of the cannons by the enemy; otherwise this clause should operate nothing; seeing, without it, the naked name of a contract would oblige to restitution; 3dly, Albeit the borrower were free of *casus fortuitus*, yet that is defined and understood to be, *quia a nemine potest prævideri*; but nobody could have been ignorant of this chance, to have been taken by that enemy who were then imminent, and against whom particularly the cannons were borrowed; 4thly, By all consents, *commodatarius tenetur pro levissima culpa et summa diligentia*, whereinto the defender failed; for they alleged only an attempt, for carrying back the cannons to the pursuer; but they should have used other attempts, other days, and other ways; and likewise they were negligent, that they buried the cannon to the knowledge of their whole town; whereas they should have entrusted some few to have done it in the night; likeas, they failed in this, that they made no application, as others did, who got back their cannon by a public proclamation by the Usurper, that all cannons taken off ships should be restored, to enable the shipping against the Spaniards and Dutch. The defender answered to the first allegiance, That he did not deny but in *commodato estimato*, the whole peril was upon the borrower, but denied that this was *commodatum estimatum*; for all Lawyers do define *commodatum estimatum* in the same way as *dos estimata*, to be where the obligation is alternative, either to restore the thing borrowed or the price, at the option of the borrower; so that the lender is no more *dominus*, nor can demand the thing borrowed, which becomes the borrower's, unless he please to give it back, *et res perit suo domino*; but where the value is only liquidated in case of deterioration, or in case of failzie, the borrower cannot free himself by offering the price, but the lender may call for the thing, although it were deteriorated; but here the liquidation of the price is only in case of deterioration, and the dominion is unquestionably in the lender: To the second, it was denied, That the borrower had here undertaken the peril; for the words of the contract, being hurt, skaith, and damage, in the proper and vulgar use, do not

signify peril or hazard, but only deterioration, and have this equipollent positive, to restore the guns in as good case as they receive them, which would never import force or accident; and for the expressing of that clause, nothing is more ordinary than to express clauses, *quæ natura contractus insunt*; and the adjection of this clause may have these uses, *first*, It liquidates the value, in case the borrower fail, without putting the lender to prove the same; *2dly*, Whereas a simple loan might only have obliged the borrower to diligence, so that, if, without his fault in making the use, for which the thing was borrowed, it had been deteriorated and lost, the borrower would not have been liable, as he that lends clothes to be worn, must not demand the deterioration by that ordinary wearing without fault; or he who lends a horse to a battle must not require reparation if he be wounded or killed in the battle, unless he have a special obligation, to have him restored without hurt; so, in this case, the parties having foreseen the ordinary case of the cannons, being hurt in defending the town, by much shooting, or by the shot of the enemies, hath provided, that even the damage in that use should be repaired, which can never be extended to an accidental loss of the cannon, not in defence of the town, but after the enemy had over-run the nation, and taken Dundee, and Arbroath was dismantled, the cannons were taken out of the sand: To the *third*, *Casus fortuitus* is not that which cannot be foreseen to be possible, but that which cannot be foreseen to have a sufficient, at least a very probable cause, otherwise there should be no *casus fortuitus*; but this case which happened had been most ominous for any Scotsman to have supposed, as most probable, that, before breaking of the army, or the English coming over Forth, the kingdom should have been lost: To the *fourth*, The defenders were noways *in culpa* or *mora*, but did more than they were obliged; for they were obliged to restore but upon demand, and before demand they endeavoured to have restored, and then they buried the cannon within the sea-mark in the night; and, though there was a proclamation to give up all arms, under the pain of death, they did not discover their cannon, albeit, upon their discovery otherwise, one of their Magistrates ran the hazard of his life; and as for the proclamation alleged, it meets not this case, their cannon not having been taken off ships; and if it was public, the pursuer behoved equally to know it, and should have made his address for his own cannon, neither would the defenders have refused their concurrence, if it had been useful, or desired. The pursuer opposed his former answers, and added, that the law cited spoke expressly of *commodatum estimatum*, to transfer the peril on the borrower; and there is no law adduced to restrict it, not to take place in that which is estimated only in the case of deterioration, *et ubi lex non distinguit nec nos*; and as to the meaning of the clause, *in dubiis interpretatio facienda est contra proferentem qui potuit legem sibi apertius dixisse*. So this bond being the defender's words, blame himself if he made not that clear. The defender answered, That, albeit that be one rule of interpretation, yet there are others stronger making for him, *viz. In dubiis*

No II. *respondendum pro reo, in dubiis pars mitior et æquior sequenda.* Now, it cannot be thought that parties would have been so unreasonable, as to have demanded restitution, if the kingdom were lost, and the cannon taken, after all diligence done to keep them; but this is the most special rule, *In dubiis respondendum secundum naturam actus aut contractus.*

THE LORDS found, that, by the nature and tenor of this contract, the defenders were not liable for this accident that happened; and that they were not *in mora* nor *culpa*, but had done all diligence; and, therefore, found the cannon lost to the pursuer and lender; and suspended the letters *simpliciter*.

Thereafter, upon pronouncing of the interlocutor, the pursuer offered to prove, by the writer and witnesses inserted in the bond, that it was expressly treated and agreed, and that the meaning of the clause was, that the defender should be liable to all hazard, and desired the witnesses at least to be examined *ex officio*. The defender *alleged*, That the pursuer having got a term already to examine witnesses *ex officio*, and the parties being examined, he could not now demand a new term, neither could a clear clause in a bond be altered by witnesses. The pursuer *answered*, That the clause was at best but dubious; and so the meaning was not to prove against the writ, but to clear the same, which is ordinary.

THE LORDS would not give any further term for leading witnesses; but found the allegiance only probable by the oath of the party.

Fol. Dic. v. 2. p. 57. Stair, v. 1. p. 563.

* * * Gosford reports this case.

WILLIAM DUNCAN being assignee constituted by Alexander Carmichael, skipper in Dundee, in and to a bond granted by the Bailies of Arbroath, whereby they had granted that they had received, in borrowing, some ship guns, which they were obliged to re-deliver, free of all hurt, harm, or skaith; and, in case they should incur any hurt, harm, and skaith, to pay the sum of L. 500; the said Bailies being charged for payment of the sum, did suspend upon this reason, that it being clear by the bond, that they being in the case of *commodatum*, they could not be liable; because, they having done exact diligence to preserve the guns, having buried them in the sand within the sea-mark and flood, from whence they were taken by the English army, after they were masters of all Scotland; this reason was found relevant, notwithstanding that it was *alleged*, That, by the civil law, *D. De commodato*, where *commodatum est æstimatum commodatarius tenetur in omne periculum*; and by the bond itself, the borrowers being obliged, as said is, did make themselves liable *ob casus fortuitos et vim majorem*: For the LORDS found, that the suspender being neither *in culpa* nor *mora*, and the guns not being lost in the making use thereof for their defence against the English ships, for which end they were borrowed, but that they were taken by the land forces, which was such a case

as could not be foreseen ; and that, if the guns had remained with the lenders, they had been lost with that same prevalent power ; and, therefore, they could not be liable.

No 11.

Gosford, MS. No 51.

1679. July 16.

JOHN BINNY, Postmaster, *against* Monsieur ANDREW VEAUX, Dancingmaster.

No 12.

THE LORDS found, where a man hires a horse, if it die, or fall sick or crooked by the way, (though he can prove that he rode *modo debito*, and no farther than the place agreed upon,) yet the rider must further prove the *casus fortuitus quem nulla præcessit illius culpa*, nor negligence, and the defect or latent disease it had before he hired it ; and if he succumb in proving this, he must pay the price of the horse, or the party's damage and interest. The Chancellor's vote cast this decision, *viz.* that the rider should prove the accident, and his own diligence, which is *perquam durum*. This is a difficult probation to burden the rider with, since horses may have latent diseases before the hiring.

Fol. Dic. v. 4. p. 57. Fountainball, v. 1. p. 51.

1680. December 21.

Mr ALEXANDER BIRNIE, Advocate, *against* The KEEPER of the Park of HOLYROODHOUSE.

No 13.

THE LORDS assolizied the defender from the price of the horse, because of the printed placards, unless he would say they were accessory to the loss of the horse, by fraud or negligence ; and found it not in the case of the edict *nautæ, caupones, stabularii*.

Fol. Dic. v. 2. p. 56. Fountainball, MS.

1684. February 20.

PATRICK MAXWELL *against* Mrs TODRIGE.

No 14.

PATRICK MAXWELL, one of the King's guard, pursuing Mrs Todrige, keeper of the King's Park of Holyroodhouse, for the price of a horse he gave in to be grazed there, and which was stolen or lost : *Alleged*, She cannot be liable, *nisi pro dolo et culpa* ; and by a placard, or printed program, she had intimated the conditions on which she took them in, *viz.* that the inputter took his hazard of all chances, as breaking their neck, taking out one horse for another

- No 14.** by mistake, by false tokens, or the like ; and that this was sustained already in a pursuit against her by Mr Alexander Birnie, Advocate, *supra*, and the Bailie of the Abbey Court having decerned against her, and she having suspended, the LORDS, on Forret's report, reduced the said decreet, and assoilzied her, unless they would prove she was accessory.

Fol. Dic. v. 2. p. 56. Fountainhall, v. 1. p. 272.

1687. June

DAVID JOHNSTON *against* RANKIN.

No 15.

In a pursuit for the hire of a horse, it was *alleged* for the defender, That he having ridden him the length of Dunbar, in company with others, very soberly, the horse fell sick and lame, so as he was forced to leave the beast there, which he intimated to the hirer.

THE LORDS found the defender free of the hire, and of the charges of the horse at Dunbar;

Fol. Dic. v. 2. p. 57. Harcarse, (SUMMONS.) No 930. p. 261.

1688. February 28.

TROTTER *against* BUCHANAN.

No 16.

ONE Trotter having hired a horse from Buchanan in Cockenzie, there is a decreet obtained against him for the horse, or its price ; which was suspended on this reason, that having ridden to Leith with him, he was stolen out of a stable there. *Answered*, This was not sufficient, seeing he might pursue the stabler. *Replied*, The *casus fortuitus* must defend both, there being neither *dolus* nor *culpa* qualified against them—THE LORDS, on Boyne's report, found the reason of suspension relevant to assoilzie him, that the suspender did deliver the horse to the keeper of a common stable, to be kept in his stable ; and that the horse was stolen out of that stable : And also sustain the charger's answer, that the suspender, either *scripto vel juramento*, promised to satisfy the charger for the horse. But it may be considered how far the edict *nautæ, caupones, stabularii*, may reach at least the stabler ; seeing Patrick Steel was made liable for the Master of Forbes's cloak stolen in his house, though it was not proved that his servants did it. No 2. p. 9233.

Fol. Dic. v. 2. p. 57. Fountainhall, v. 1. p. 501.

* * Harcarse reports this case.

No 16.

ONE being pursued for the price of a horse hired from the Pans to Leith, where the conductor delivered him to a stabler, and he was stolen away, without the stables, by some who broke the stable ;

THE LORDS assoilzied the defender ; because, *conductor non tenetur præstare asus fortuitos.*

Harcarse, (COMMODATUM.) No 251. p. 59.

1749. June 2.

— against DAVIDSON.

THE wood of Darnway, belonging to the Earl of Moray, being employed for grazing cattle, put in by the country for a certain small grass-mail,

brought a process before the Sheriff-substitute of Elgin against Davidson, the Earl's servant, who had received from him six beasts to be grazed in the wood, either to restore his beasts that were amissing, or to pay the value.

The defender acknowledged the receipt of the beasts ; but *pleaded* in defence, That, as the wood was of a great extent, fenced on one side only by the water of Findhorn, which, in many places, was fordable, and the rest of it very insufficiently inclosed, and well known to be so by the country, who put in their cattle ; such as put cattle into it a-grazing were presumed to run the hazard of their straying or being stolen : And further, that, as the defender was in use to certify such as put in cattle, that they were to run all hazards, so the pursuer had been certified thereof. And the Sheriff having allowed a proof, before answer, on this last allegiance, and on the value of the cattle, a proof was brought, in general, of the park-keeper's being in use so to certify the inputters, as alleged ; but no proof being brought, that the pursuer, in particular, had been so certified, the Sheriff-substitute " Found the defender liable in the sum of _____ as the value of the cattle ; and decerned."

The debate, at discussing the suspension of this decree, being reported by Lord Easdale, Probationer, his opinion was, That the edict *nauta, caupones*, under which the charger argued the case to fall, was noways applicable to this case, as it was a constitution limited to the particulars therein expressed, and proceeding on special reasons ; but that the case was to be determined by the rules of law *in locationibus* ; and the LORDS, upon advising, were of the same opinion.

But having further given it as his opinion, That, as the locator was only liable for the *culpa levis*, and such ordinary diligence as a man adhibits in his

No 17.

A wood of great extent was employed in grazing, and some cattle were amissing. The keeper was considered to be liable for ordinary diligence, in looking after them.

No 17.

own affairs, and that no man could be answerable, in the nature of the thing, for beasts that might stray or be stolen from this wood, which was admitted to be of the extent of many miles, and insufficiently inclosed, the decree fell to be suspended :—THE LORDS, on advising, agreed in the main with the opinion given ; but they thought it too general to find that the park-keeper was obliged to give no sort of account of the care taken by him to preserve the cattle put into the wood, as what might be a dangerous precedent, and even of bad consequence to the proprietors of grounds, which, in that part of the country, are often employed in grazing cattle, without having any inclosures at all about them, as nobody would thereafter deal with them : That it was at least the duty of the keeper, frequently, if not once every day, to see whether or not the cattle were safe :

They, therefore, “ Recommended to the Ordinary, to order the defender to condescend, what was the care usually taken of the cattle put a-grazing into that wood, and what care was by him taken in this case ; and to allow a proof to either party, before answer ; and, particularly, to the pursuer to prove any acts of negligence which he might allege :” Plainly enough insinuating, that, if the defender should prove, that he had found the cattle in the park in a short time before they were amissing, and that either himself made diligent search for them when they were missed, or timeously acquainted the pursuer therewith, he would be safe ; but that, if he had no more to say, but that though the cattle were away, he was not bound to answer what had become of them, he would be found liable.

Fol. Dic. v. 4. p. 57. Kilkerran, (PERICULUM.) No 6. p. 379.

SECT. III.

Periculum between Mandant and Mandatary.—Postmaster, whether answerable for Money sent by Post.

1583. July —.

ANDERSON against ———.

No 18.

A person received money to be lodged with a merchant beyond seas. The money being lost by shipwreck, he was not liable for it.

THERE was a burgess in Aberdeen, called Anderson, who pursued another burgess for the delivering to him of the sum of six score-crowns, the which he gave command to the defender, to receive from J. M. factor, and thereafter to carry the same to B. and to deliver them to one Peter M. there, to the effect, that they might be employed in the buying of wines. It was answered by the defender, That he fulfilled the command of the pursuer, in receiving of the crowns from the factor, and took them to B. and could not find the said Peter

there, and therefore he brought the said crowns away with him, and did bestow his labour, trouble, and diligence upon them, as he did with his own, and in the meantime, the ship that he was into was stricken into Portsmouth in England, by storm of weather, and there into the road in a stormy night the cables and the ship driven upon shore suffered *naufragium*, so that the crowns with the rest of the defender's gear, which was in a coffer, perished, *et sic mandatarius ille non tenebatur prestare casum fortuitum, prout in L. 26. D. Mandati, verba textus in § 6. non omnia quæ impensurus non fuit, mandatori imputabit; veluti quod spoliatus sit a latronibus aut naufragio res amiserit; et in L. 13. C. Mandati.* To this was answered, that the defender ought not to have transported the said crowns forth of B., because the pursuer offered him to prove, that there were sundry Scots merchants, who being in B. at that present time, offered to take the said crowns *omni periculo*, and to give so much advantage upon the frank, and pay the same to the pursuer; and so it appeared, that in so far as the defender refused the same *non eam fidem et diligentiam adhibuit in negotio quam diligens paterfamilias adhibuisset, et in L. 3. D. Mandati, causa mandantis melior fieri potest, nunquam deterior*, and so the defender in so far as he did not give forth the crowns to the utility and profit of the pursuer, was *in lata culpa*. To which it was answered, that the defender in no manner of way ought to have given forth the crowns to the said pursuer's profit, *quia fuit ultra fines mandati*, and the pursuer might have found fault with that, as well as with the other *et de jure in L. Si procuratorem, § Dolo D. procurator tenetur tantum de lata culpa quando quis curat alienas res ita ut proprias, arg. L. 32. D. Depositi, ut in presente casu*, the defender used the crowns and the pursuer's gear, in all respects as his own, and alike to the peril and danger, and so by this dealing, it was clear and manifest, *quod non fuit in lata culpa, quia nulla fuit suspicio fraudis aut doli, quia æquiparantur fraus dolus et lata culpa*. THE LORDS, after long reasoning, found by interlocutor, that the exception should be admitted, the defenders proving that the ship suffered *naufragium*, and that his own gear that was therein perished.

Fol. Dic. v. 2. p. 57. Colvil, MS. p. 372.

1675. June 4.

HAY against GRAY.

No 19.

A MERCHANT having given a commission to a skipper, to carry a parcel of salmon to Bourdeaux, and upon the sale of the same there, to bring home wines and prunes; pursued the said skipper for the said salmon and profit thereof, and referred the libel to the skipper's oath; and the defender having qualified his oath on these terms, viz. that being upon his voyage to France, he was forced to go into Holland by storm of weather, so that he could not go to Bourdeaux, and that he was forced to sell the salmon in Holland, and with

A shipmaster who sold goods for a merchant, and bought others for him of a different kind from those ordered, was found liable; the goods ha-

No 19.
 ving been
 taken by an
 enemy at sea,
 on the pas-
 sage.

the price of the same did buy a parcel of cards and other goods mentioned in his oath, for the pursuer's use ; and having embarked the same to be transported to Scotland, and in the *interim* war having arisen, the ship and goods were taken by the Dutch ; and that he had done for the pursuer as for himself, and as other merchants had done for themselves ; which oath being advised, it was debated amongst the Lords, whether the defender should be assoilzied, in respect of the oath and qualification foresaid ; and it was found, that albeit the defender might be excused upon the account foresaid, for not going to Bourdeaux and fulfilling his commission *in terminis*, yet as to the buying of the parcel of cards with the product of the salmon, and the embarking of the same for the pursuer's use, for which he had no order, he was to be considered as *negotiorum gestor*, and upon his own hazard, and could not prejudice the pursuer by disposing of his money, unless he were able to say, *gessit utiliter* both *consilio et eventu* ; specially seeing he might have secured his money in factors hands, or transmitted the same by bills of exchange, without employing, or far less hazarding the same without order.

Clerk, Hay.

Fol. Dic. v. 2. p. 58. Dirleton, No 259. p. 105.

* * * Gosford reports this case.

IN an action at Hays instance against Gray, for making payment of the price of ten barrels of salmon in trust by him, to the said Gray as skipper, to be carried in his ship to Bourdeaux, with an express commission, that he should sell the same, and with the price thereof bring home wine to Leith, which was referred to his oath ; he having deponed, that he had received aboard the said quantity of salmon, with many other commodities of greater value from other merchants, and that he made sail to go for Bourdeaux, but by stress of weather was driven into Holland, after which time the war being declared betwixt the King and Holland, he did sell the said barrels of salmon, as other merchants did theirs, and with the price thereof, did buy a parcel of lint and hemp, which he did put in another ship going for Scotland, which was seized upon, and declared a lawful prize ;—the parties' advocates being heard at the advising of a cause, it was *alleged* for the pursuer, That the skipper ought to be decerned for the value of the salmon, because he had transgressed his commission, which was to buy wine and vinegar, and albeit he was forced by storm to go into Holland, yet the war being declared, he was *in mala fide* to buy commodities there to send to Scotland, seeing he might have remitted the money received, by bills of exchange, without any danger, It was *answered*, That he could not be liable as having received a commission, because it was impossible he could execute the same ; neither could he be decerned as having brought the foresaid commodities into Holland to be sent to Scotland, because that part of his loading of salmon being but inconsiderable,

he disposed thereof, and of the goods he bought with the price as he did with his own, and as others entrusted with the rest of his loading did with theirs. THE LORDS did find the skipper liable for the price, deducting so much for the exchange as it would then have given, if he had remitted the money, upon that reason, that the war being declared, he ought not to have bought goods in Holland, nor sent them to Scotland by sea under so great a hazard; which seems hard, seeing by the impossibility to execute the commission, he was in the case of *negotiorum gestor*, and disposed with that parcel as he did with his own, and as other merchants did who had a greater quantity, and run a greater hazard; and if he had remitted the money by bills, there might have arisen a great hazard, as well as by sending the goods by sea.

Gosford, MS. No 754. p. 468.

No 19.

1687. July 8. ANDREW ALEXANDER against SIR JAMES CALDER.

No 20.

ANDREW ALEXANDER, late factor at Rochelle, against Sir James Calder of Muirton, for payment of a bill of exchange:—THE LORDS found Andrew had exceeded *fines mandati* in not selling the salmon at Rochelle, but sending them to Bilboa in Spain, in hopes of a better market, though it proved contrary, and therefore assoilzied from exchange and re-exchange; but ordained him to be heard anent the annualrent of it.

Fol. Dic. v. 2. p. 58. Fountainhall, v. 1. p. 464.

1696. November 12. M'NEIL, ROWAN, &c. against GEORGE DAWLING.

No 21.

IN the concluded cause, M'Neil, Rowan, and other merchants in Glasgow, against George Dawling skipper in Greenock, for compt, reckoning, and payment of the value of a cargo of herrings they trusted him with to Stockholm in Sweden; his defence was, he consigned them to Alexander Pittillo, a factor there, and with their produce bought from him dales, iron, and tar; and after his ship was loaded, he breaking, and being debtor to the King of Sweden for public dues, the government there seized on his ship, and *manu forti* took away the goods as Pittillo's.—*Answered, 1mo*, You being not only skipper, but having a special factory and commission, you could not consign them to another factor; but the very nature of your trust and mandate obliged you to sell for ready money; at least, to have enquired whom you trusted, and exacted caution; and if you did not, it is on your own peril, and not your constituents; *2do*, Pittillo's condition was at that time suspect, and he shortly after broke, and so you was *in mala fide*.—THE LORDS, as to the first point, found a *mandatarius* trusting another did not exactly obey the terms of his mandate, but followed the faith of that other on his peril, and was liable for the event, tho'

A mandatary trusting to another, does not in doing so without orders, comply exactly with his mandate, and must be liable for the consequences.

No 21. there was neither *dolus* nor *lata culpa* chargeable on the *mandatarius* ; but any negligence and omission, (not having exactly followed his mandate,) lay at his door, even as if an advocate should delegate another to manage for him, he must be answerable, because in such cases *industria personæ* is elected. And there was ground of suspicion against the factor ; and it was not proved that he had trusted his own part of the cargo to him, as he had alleged ; and there is no less diligence required in a mandatar's executing his commission than he uses to adhibit in his own affairs. Law impedes him not to substitute, but if he do, he must take his hazard of the event, and not throw it over on his constituents. But the LORDs would not have required this exact diligence of him *qua* skipper, had he not also been supercargo, with a special commission and trust, because he had been oft there, and had the Swedish language.

Fel. Dic. v. 2. p. 58. Fountainhall, v. 1. p. 733.

1707. March 7.

LORD INVERURY against JAMES GORDON, Merchant in Edinburgh.

No 22.

A merchant who sold wine, was desired by the buyer to purchase a cask to put it in, to be carried by sea. The cask having been insufficient, the merchant was found liable to restore the price.

INVERURY having bought 18 gallons of Florence wine from Gordon, and he telling he had no less than a butt, he desired him to get him a cask and hogshead to draw it off, to be shipped on board a vessel then lying at Leith, and shortly to sail to the north. Accordingly he went to a couper, and got him a cask, which he looked on as sufficient, and put the wine into it, and shipped it ; but the ship being retarded with contrary winds, ere it came to Inverury, it was found the wine had syped out, and so was all lost and spilt. My Lord pursues Mr Gordon for the damage, he having furnished him with a leaky insufficient cask, though he had trusted the care of it to him.—*Alleged*, He can never be liable, for all his concern was to deliver him the wine ; but to provide him a cask to put it in was a mere act of kindness and friendship done at my Lord's desire, to serve him *tanquam quilibet* ; likeas it stood twenty-four hours before it was boated, and not the least appearance of any defect, and was shipped, and so received by the skipper in good condition ; but a storm having risen, they were driven into the Wemyss harbour, and, by the agitation of the ship, it might have got a dash, so that either the couper, furnisher, or the skipper may be answerable ; but it is impossible to reach Mr Gordon, who only bestowed his pains ; and so it was *locatio operæ tanquam proxeneta*, and no more.—THE LORDs, before answer, allowed a conjunct probation as to Bailie Gordon's undertaking the trust of furnishing a cask, and what trial was taken of it before the wine was put into it ; and if the loss was casual and accidental, or by any latent defect and insufficiency in the cask ; and the LORDs coming to advise the testimonies of the witnesses adduced *bine inde*, Mr Gordon *alleged*, That no more diligence could be required of him than what he had done ; for he being desired to look at a cask, he did so, and saw no visible fault in it ; and by the

custom of all the trading nations, the latent insufficiency of goods affording redhibition can never oblige the furnisher, as is clear by the Roman law, *tit. Dig. et Cod. De edicto ædilitio, Si venditor vitium ignoraverit, non tenetur ad damnum ex re vitiosa proveniente*, especially, *si gratuito intervenerit*; and although a man should, in selling a slave, commend him, that will not import he is endued the philosophical virtues, *et consilii non fraudulentum nulla est obligatio*; and where a loss is ascribeable either to fault or fatality, law presumes it rather to be *ex casu quam ex culpa*; and he cannot be supposed to have undertaken sea hazard. But the LORDS, on advising the probation, found it proved, that Mr Gordon had undertaken to furnish the cask; and that the cask was insufficient, and through its insufficiency the wine had run out; and so found him liable; which would import, if he had received the price, then to restore it, and if not, then to assolvie my Lord from payment of it. Some thought all that Mr Gordon did in this case was *nudum ministerium* to accommodate and serve my Lord, and that *officium nemini debet esse damnosum*, unless *culpa vel dolus* can be qualified; but here the LORDS found he had interposed to uphold and warrant it, and had said a double cask was needless.

Fol. Dic. v. 2. p. 48. Fountainball, v. 2. p. 356.

1711. January 2.

GEORGE GIBSON, Skipper in Borrowstounness, and ANDREW WILSON, Writer his Assignee, against ROBERT LEITH, Writer in Edinburgh.

ROBERT LEITH, writer in Edinburgh, and others, gave a commission to George Gibson to buy for them a ship in Holland, and accepted bills for the price of their respective shares; particularly Robert Leith accepted a bill of L. 50 Sterling, payable to George Gibson or order, at Martinmas 1709, as the price of a twelfth part of the ship, upon his delivering a vendition thereof to Mr Leith. Sometime after the ship was bought and brought home to Scotland, and had there suffered a disaster in breaking of her back. George Gibson offered a vendition of the twelfth part to Robert Leith, upon payment of the L. 50, his share of the price, and upon his refusal protested the bill, and charged him to pay. Robert Leith suspended upon this ground, That the vendition not being offered *debito tempore*, while *res* was *integra*, he is not obliged to accept of a damaged ship in place of a sound one for his money. And Gibson being *dominus* by buying the ship, and taking the right thereof in his own name, the *periculum* was his till he denuded by a vendition. For the commission gave not the suspender *jus in re*, but only *jus ad rem*, to claim a vendition by an ordinary action; notwithstanding whereof Gibson, having a complete right to the ship in his person, might have sold her effectually to another; and *res perit suo domino*.

No 22.

No 23.

A party accepted a bill for a sum, as the price of a part of a ship he had commissioned the drawer to buy for him, payable to the drawer or order, upon his delivering a vendition to the acceptor. The bill found due, although the ship was bought by the drawer in his own name, and he never offered the vendition till after the

No 23.
ship had been damaged; the constituent never having offered the money, or demanded the vendition.

Replied for the charger; Mr Gibson having bought the ship by the suspender's order, the latter was properly *dominus*; for *mandatarius* may take the right to be acquired either in his own, or the constituent's name. It was not reasonable for Mr Gibson to take the original right to the ship in the suspender's name, who had not paid the price; nor was he obliged to transmit the vendition, till he got payment. However, the same was in his name only as *fiduciarius* for the suspender; consequently, any damage the ship sustained must fall upon him.

THE LORDS repelled the reason of suspension, and found the letters orderly proceeded.

Fol. Dic. v. 2. p. 58. Forbes, p. 472.

1716. July 28. JOHN YOUNG *against* COLIN FINLAY.

No 24.
A shipmaster who had exceeded his commission, by buying goods with the proceeds of a cargo, which goods were lost, was found liable for the price of the first cargo.

JOHN YOUNG having shipped on board the Phoenix of Glasgow, Colin Finlay master, a parcel of salmon, whereof Colin grants receipt, and obliges them to deliver the goods to John Young's at Bilboa; thereafter Young gives him commission to dispose of them when he should come there, and takes his obligation, subjoined to the receipt, wherein he binds him to be comptable for the goods, sea-hazard excepted, and he receiving factor-fee: The skipper accordingly sells the salmon at Bilboa, but sent no advice to Mr Young, either at what rate they were sold, or how he should be paid of the proceeds; and having thereafter bought wines with the money, the ship coming from Bilboa, was taken up to England, and there condemned; so that these wines, bought with Mr Young's money, on his account, run the same fate with the rest of the cargo.

The question turning upon this, Whether, in the case above mentioned, the skipper was peremptorily tied down to return money for the salmon, or if, by his commission, he had the liberty, at discretion, to purchase for them such goods as were usually imported from that country, and to be comptable for these?

It was *alleged* for the defender Finlay; That the commission being general, seemed to lay no other tie upon him than what was incumbent to be done by factors in the like case; and, in that view, Young the pursuer ought to prove, that that was to center the salmon precisely into money; and then he behoved also to prove that the defender was obliged to remit the money by bills, or to carry it home in specie; if the last, then the ship having been taken without the defender's fault, and so it being indifferent what was the return he made, he was free. And, as to the first, the defender's commission was general. That it is impossible he could be made liable to do otherways than he did for himself and the rest of his employers; or, if the pursuer had inclined that his salmon should be managed in any singular manner from the rest of the cargo outward

bound, he should have taken the defender otherways obliged than he had done.

No 24.

Answered for Young the pursuer; That the obligation is clear, 'that the defender was to dispose on the pursuer's goods.' Now, this can noways be meant of bartering the same with other commodities; because, the constant and current practice among merchants, when any such thing is intended, is to order the neat proceeds of the outwards cargo to be reinvested, and to mention the merchandise in which the same is to be so reinvested; nothing of which was done in the present case; and therefore the above clause of the obligation must be interpreted to be disposing of the merchandise by way of sale, for ready money, which the defender might have remitted or brought home: And, tho' he did indeed get ready money for the goods; yet, he having bestowed that on other goods, the objection still recurs, viz. that this was *ultra vires mandati*; besides, that in this case the defender ought certainly to have sent the pursuer a bill of loading, or letters of advice, that such goods were shipped in return of the salmon upon the pursuer's own account: For, supposing the wines had come safely home, yet the pursuer not having any bill of loading or advice as above, he could have had no pretence to demand the wine, neither could he know what quantity, nor what number he was to call for; and the defender's obligation could have afforded him no action, not having ordered wines, or any other commodities to be brought in return from Bilboa: So that, if the defender had offered the price he received at the port, he would have justly contended that he had satisfied the terms of his commission; and therefore, now that the wines are lost, he cannot be heard to turn over the loss upon the pursuer.

'THE LORDS found, That the skipper having sold the salmon, and bought the wines for the price, without giving advice thereof to the pursuer, is liable for the prices of the salmon.'

Act. *Grabame.*Alt. *M'Kenzie.*Clark, *Roberton.*

Fol. Dic. v. 2. p. 58. Bruce, v. 2. No 29. p. 37.

1724. July 17.

GEORGE TAYLOR, Merchant in Amsterdam, against JAMES JOHNSTON,
Merchant in Edinburgh.

MR JOHNSTON, by his letter 23d August 1718, to Mr Taylor merchant and factor at Amsterdam, directed him to buy several parcels of goods particularly expressed in the letter, 'and ordered him to deliver them to Mr Andrew Man shipmaster, to be found at Mr Adam Duncan's merchant in Rotterdam, from whence he was to sail with the goods for Scotland, and to take Mr Man's receipt for the goods,' which the letter said should be sufficient.

No 25.

A factor who had employed one to enter goods, instead of doing it himself, was found liable for them, having been seized as not properly entered.

No 25.

Mr Taylor accordingly bought the goods, delivered them to Mr Man, and took his receipt for them, dated at Rotterdam 18th September 1718, in which Man obliged himself to deliver the same to Mr Johnston at Edinburgh, or his order, sea-hazard, customhouse-officers, and all other hazards excepted.

Mr Taylor also on the 27th September 1718 transmitted to Mr Johnston an invoice of the goods, with the prices and charges, &c. and amongst other articles he stated 23 guilders, 2 stivers, as paid for custom, passports, and to searchers.

Mr Man sailed from Rotterdam with the whole goods, being nine boxes and one barrel; but it happened, that upon a search of the ship by the customhouse-officers at Helvoetsluys, (the port at the mouth of the Maese, by which ships from Rotterdam to Scotland must pass) five of the boxes and the barrel were taken out and detained by the officers.

Mr Johnston having received but four of the boxes, acquainted Mr Taylor of the seizure, and complained of an undue entry made at Rotterdam, as the occasion of it. Mr Taylor, in return to Mr Johnston's letter, wrote him on the 18th November 1718, that he regreted the misfortune, but insisted, that it was none of his fault, in respect that he had given orders to Mr Duncan to make the proper entry of the goods; and at the same time he acquainted Mr Johnston that the goods were relaxed, and that he hoped Mr Johnston would find another opportunity for bringing them home.

In September 1719 Mr Taylor drew a bill on Mr Johnston, payable to his factor Mr Blair at Edinburgh, for the prices charged in the invoice, with interest from the first of January preceding, which was the time when the price of the goods was actually advanced. Mr Johnston having refused to accept the bill, process was raised against him upon his first letter commissioning the goods, and Mr Man's receipt of them.

It was *pleaded* in defence for him, That he must have allowance of the value of the five boxes and barrel which had been detained at Helvoetsluys, since the seizure was occasioned by Mr Taylor's fault, who was, by his acceptance of the commission, bound to have made the proper entries of the goods, and expedite the necessary clearances; and for proof of this, Mr Johnston produced a declaration of merchants, importing, 'That factors abroad were understood to be obliged not only to buy goods, &c. commissioned from foreign parts, but also to make the proper entries of them, and procure the necessary clearances of customs,' &c.

It was *answered* for Mr Taylor, *1mo*, Admitting the above to be the case of ordinary and general commissions, yet that could not take place in the present case, where the commission expressly directed the taking a receipt of the goods from Mr Man, which was declared to be sufficient; *2do*, The care of entering the goods, and procuring clearances, appeared to have been the less incumbent on the pursuer, that he did not reside at the port where the goods were to be entered on board; *3tio*, No evidence was brought, that the detaining the goods

happened for want of the proper entry and clearances; on the contrary, the presumption was, that it proceeded from some fault of Mr Man's, or at least the unreasonable proceedings of the customhouse-officers, since the goods were relaxed and ready to be re-delivered in less than a month after the seizure.

Replied for Mr Johnston to the first and second answers, That there was nothing particular in the commission, it being generally expressed in all such commissions, that the shipmaster's receipt shall be sufficient; but this is never understood to liberate the factor from the necessity of making the proper entries and procuring clearances; on the contrary, it appeared from the pursuer's own letter 18th November 1718, that he understood it to be a part of his duty, even though he did not reside at Rotterdam, in so far as he gave a commission to Mr Duncan to take care of these particulars for him, and did actually charge in his invoice 23 guilders 2 stivers on account of entries and clearances; so that whether it was his or Mr Duncan's fault, he must suffer the loss. As to the third reply, it was reserved to proof.

THE LORDS found, That Mr Taylor having employed Duncan to enter and ship the goods libelled, and having stated the expenses of entries and shipping to Mr Johnston, Mr Taylor was liable for the fault and neglect of Mr Duncan.

Reporter, *Lord Forglan.*
Clerk, *Gibson.*

Act. *Jo. Fleming & Ro. Craigie.*

Alt. *Jo. Horn.*

Fol. Dic. v. 4. p. 58. Edgar, p. 94.

1724. *July 28.*

ELIZABETH SHORT, Relict of Mr HUGH MACKAILL, *against* WILLIAM HAMILTON, Post-Master of Falkirk.

MRS MACKAILL having occasion to send four guineas to Lieutenant Bray at Edinburgh, she inclosed them carefully in a letter directed to him, and committed it to the care of the Post-master of Falkirk. The letter was delivered to Mr Bray at the post-office in Edinburgh, but the four guineas were amissing; upon which Mrs Mackaill pursued Hamilton the Post-master, before the Justices of Peace of Stirlingshire; and a proof of the fact being taken, the Justices decerned Hamilton in payment of the four guineas.

Of this decret suspension was obtained: The reasons were, *1mo*, That by the rules of the post-offices, letters containing money, or any other valuable thing, are brought to the office, and there the contents are shown to the officer and sealed in his presence, and marked by him, after which he is answerable; but this in the present case was neglected, and the letter only marked to pay the ordinary postage of a single letter; *2do*, When the letter was delivered at

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No 25.

No 26.

Cash in gold was inclosed in a letter, and committed in charge to a post-master, which not having been delivered, he was found liable.

No 26.

Edinburgh, the three seals were entire, and therefore the Post-master was not chargeable with the contents.

In *answer* to these reasons, the substance of the proof before the inferior court was resumed, viz. Mrs Mackaill deponed upon the inclosing of the four guineas in a letter sealed with three seals and tipped with wax on both sides, and addressed to the Lieutenant. Margaret White, a common carrier of letters to and from the post-office of Falkirk, deponed, That she delivered the letter to Janet Thomson the defender's spouse, who was constituted by him to receive the letters, and at delivery she acquainted her that there were four guineas in it. Jean White deponed, That she was present when the letter was delivered, and heard the former witness acquaint the Post-master's wife with the contents. The defender's wife deponed, That she received the letter, and that Margaret White told her that it contained some gold, but did not remember the quantity; that she left the letter with her husband to be dispatched with the rest. Hamilton the defender likewise deponed, That he found amongst other letters in his office one with something weighty in it, and was going to mark it a double letter, but did it not, and sealed it up in the bag with the rest. Mr Bray deponed, That upon receiving his letter in the post-office of Edinburgh he immediately opened it, and finding that it ought to have contained four guineas, but that it did not, he complained to the servants of the office; and of these, two deponed conform to him, with this addition, that Hamilton sent along with the same packet a bill or label, which is usual, to take care of two letters of his own marked W. H. which were carefully delivered.

From this proof it was *contended* for the charger, That the suspender was justly decerned, since he had accepted the charge of a letter with gold in it, and had not observed the usual caution of marking the letter, so as special care might have been had of it: That the formalities mentioned in the first reason of suspension were sufficiently answered, by the delivery of the letter to his wife the *institor*, and acquainting her of the contents: That though the seals remained whole, yet it was easy enough to imagine that the gold might have been taken out.

THE LORDS found the letters orderly proceeded.

Act. *Ja. Boswell.*

Alt. *Arch. Hamilton, sen.*

Clerk, *Mackenzie.*

Fol. Dic. v. 4. p. 61. Edgar, p. 105.

1724. December 23.

VOLRATH THAM Merchant in Gottenburg *against* CHARLES and RICHARD SHERIFFS, Merchants in Prestonpans.

No 27.

A party in Sweden who had written to a correspondent that

In the month of September 1718, James Sheriff, brother to the defenders, sailed with a cargo of herrings belonging to himself and them, having a discretionary power from the defenders to carry them to any port in Sweden, where

he could dispose of the herrings for a home cargo of iron and dales; and in case he could not get such a cargo in Sweden, he was to proceed to Dantzick. He arrived at Gottenburg, having with him a recommendatory letter from the defender Richard to Mr Tham, desiring his assistance in disposing of the herrings, and referring as to particulars to his brother, who had a commission to manage the whole affair.

The pursuer, in the view of assisting James Sheriff, applied to the King of Sweden's Commissioners at Gottenburg, offering them the herrings for the service of his Majesty's army, and to take iron in return for them.

On the 19th of September 1718, the pursuer acquainted the defender Richard, by a letter, of his having made such application to the King's Commissioners; and by another letter of the 18th of October, he acquainted the same defender, That he had sold to the King's Commissioners the herrings at 20 dollars per barrel, and was to receive the iron at 16 dollars per ship's pound, and that in fourteen days or thereby, the ship would be ready to sail with the iron. By a third letter of the 17th November, the pursuer acquainted the same defender Richard, That the iron was put on board as the proceeds of the herrings; and on the 20th of November James wrote to his brothers, that he had concluded a bargain with the pursuer for the iron, but mentioned nothing of any bargain with the King's Commissioners.

James accordingly sailed with his cargo, brought it home and divided it with his brothers, according to their respective proportions of the herrings; but the true fact was, that the iron bargained for from the King not having been delivered at that time, the pursuer, in hopes that it would be delivered in a short time thereafter, had put on board the defender's ship iron of his own and of other peoples, then in his custody, to the value of what he expected from the King, and having continued in expectation of the King's iron till his Majesty's death, which happened in the January following, and for some months thereafter, he wrote no account to the defenders of the disappointment, nor made he any demand on them for the higher value at which he was obliged to replace the parcels of iron he had taken and applied to the use of the defenders; but at last having lost all hopes of getting the King's iron, he raised this process against the defenders for the value which he had been obliged to pay for that iron, wherewith he had replaced the iron which he had put aboard the defenders ship, and craved an act and commission for proving that the iron contracted to be delivered by the King for the defender's herrings never was delivered.

It was *objected*, That the point craved to be proved was a direct contradiction to the pursuer's letter of the 17th of November, wherein he acquainted the defenders, that the iron put on board their ship was the proceeds of the herrings. *2do*, Admitting their fact to be as stated, yet the defenders could not be liable, because the pursuer had plainly taken the risk and hazard of the King's iron upon himself, and must submit to the loss by it.

No 27,
he was to send him iron obtained from the Swedish government in exchange for his cargo of herrings, not having got the iron, claimed the price of other iron he had himself purchased and sent. Found barred by the terms of his letter, contrary to which he could not be allowed to aver or prove any thing.

No 27.

It was *answered*, That the contracts with the King's Commissioners were entered into with the consent, participation and knowledge of James Sherriff the defender's trustee; so that the risk behoved to be his and his constituent's, and not the pursuer's, who merely out of respect and favour to the defenders had accommodated them with iron which belonged to other people, to expedite their affairs.

Replied, That when a factor furnishes goods of his own to his constituents in expectation of receiving other goods contracted for to replace them, and does not acquaint his constituents, he, the factor, would fall to have the profit of these goods, which he expected, if their value should rise before delivery; he therefore must submit to the loss, if their value should fall, or if the goods should never be delivered: And that the defenders were neither to have the loss nor profit of the bargain between the pursuer and the King's Commissioners, seems evident from James Sherriff's letter of the 20th of November, which mentioned an absolute bargain for the iron with the pursuer, but took no notice of any concern in the bargain with the King's Commissioners.

THE LORDS found, that the pursuer having advised by his letter of 17th November 1718, that iron was loaded for the proceeds of the herrings conform to James Sheriff's commission, as supercargo by the freighters, and his letter of the 20th November, the pursuer cannot now be allowed to prove contradictory facts to his former correspondence; And found James Sherriff's knowledge (though partly concerned in the outward cargo) that part of the pursuer's or other peoples iron in his custody was shipped aboard in return of the outward cargo, not relevant against the defenders; and found no presumption that James Sherriff did advise the freighters of the true fact.

Act. *Dun. Forbes.* Alt. *Ja. Graham, sen.* Reporter, *Lord Grange.* Clerk, *Murray.*

Fol. Dic. v. 4. p. 58. Edgar, p. 134.

1730. June 18.

SELWYN against ARBUTHNOT.

No 28.

A BANKER at Edinburgh got orders to remit his correspondent's money by a bill on the bank of England, but chose rather to remit it by a bill upon a private banker in London. The bill being taken out of the post office by some unknown person, who, upon a false indorsation and receipt, got the money from the banker on whom the bill was drawn. THE LORDS found the defender's remittance by bill on the private banker was on his own risk and hazard. (See APPENDIX.) See *Baines against Turnbull*, No 77. p. 1486.

Fol. Dic. v. 2. p. 58.

1749. *January 24.*HARLE *against* OGILVIE.

No 29.
On whom the
hazard lies of
goods sent
upon commis-
sion.

In April 1746, Joshua Harle of London received a letter from Malcolm Ogilvie of Edinburgh, wherein he was desired to ship for Ogilvie's account certain quantities of sugars of different kinds, if the convoy was not sailed; and in a postscript it was added, "If the ships be all sailed, there is nothing for it, but wait the first convoy."

Upon receipt of this letter, Harle shipped the sugars aboard a vessel bound for Leith with stores for the army, and which he was informed was to fall down to sail with the convoy, but the convoy happened to be gone: Meantime, the ship escaped the enemy, and arrived at Leith; but, by some misfortune the sugars having got water, were much damnified, and Ogilvie refused to receive them.

In the action at Harle's instance for the price, the Ordinary sustained the defence, "That he had not observed the *finis mandati*;" and the Lords "adhered."

At moving the petition and answers, the President stated it as a doubtful point: On the one hand, there was not here any special commission to ship the goods in a particular ship, or to intrust a particular master with them, but only a general direction not to send them without convoy; where the reason was one single cause and could be no other, to prevent capture, to the risk whereof Harle no doubt subjected himself; but having escaped capture, the commission was no less performed than if the ship had come under convoy. But on the other hand, the property was certainly not transferred by the putting on board, as it would have been had the ship come under convoy: That was in suspense till her arrival; and although had the sugars come safe, it might have been no excuse for the defender's not accepting them, that they had not come under convoy, yet as they came not safe, and that till they arrived at the port of delivery the property of the sugars was not transferred to the defender, neither could they be on his risque.

Fol. Dic. v. 4. p. 59. Kilkerran, (PERICULUM.) No 4. p. 377.

1752. *December 21.*

WILLIAM CUMING Merchant in Edinburgh *against* JOHN and JAMES MARSHALLS Merchants in Auchtermuchty.

WILLIAM CUMING, a merchant of a fair character, sued John and James Marshalls for payment of an account, containing, among other articles, one in these words: "To bank-notes sent per post L. 100." He produced a letter from the defenders, dated 28th October 1751, ordering him to send them by the

No 30.
A merchant
alleging he
had sent bank
notes in a let-
ter by post,
which miscar-

No 30.
ried, his account book with the evidence of his clerks and his oath in supplement, were held sufficient to make his correspondents liable for the loss.

post L. 100 in notes ; and he alleged he had accordingly, the next day, upon receiving their order, wrote them an answer ; and with his own hands inclosed in it the L. 100, and sent it by his son to the post-office.

Marshalls acknowledged the commission ; but as the answers and notes had never come to their hands, *pleaded*, They had no reason to believe the money had ever been sent, and therefore they could not be liable.

A proof being allowed before answer, the pursuer was not able to bring any direct evidence, either of his having enclosed the notes, or sent the letter to the post-office. But he proved by his clerks, that, in letters which he dictated to them, he was in use to inclose bank-notes to his correspondents, and, in particular to these defenders : That he generally sealed these letters himself, and sent them to the post-office by his son, who attended his shop in the quality of a clerk : That, on the very day the letter covering the notes was said to be sent, a copy of it had been entered in his copy-book of letters, and the sum entered into his cash-book ; and that, in the same evening, his cash was balanced, and the sum found exactly to answer with the cash in hand. It appeared likewise in the proof, that the post-seal had been broke off the Falkland bag, in which this letter should have been carried. But this last circumstance did not seem to have any weight in the determination of the cause ; for, upon advising the proof, the Court was of opinion, that the pursuer's books, together with his oath in supplement, if required, was sufficient evidence that the commission was obeyed. An example was given of notifying the dishonour of a bill of exchange, where a copy of a letter to the drawer or indorser, ingrossed in the copy-book of letters, is held sufficient proof, without necessity of bringing parole evidence that the letter was wrote and delivered at the post-house.

The defenders upon hearing the opinion of the Court, did not insist for the pursuer's oath in supplement.

" THE LORDS found that Mr Cuming had executed the commission given him by Marshalls, faithfully and conform to their orders ; and therefore found the defenders liable to the pursuer in the account claimed, and also in expences of process, and for extracting the decret."

Act. *Jo. Grant*

Alt. *Ro. Craigie.*

Clerk, *Justice.*

S.

Fac. Col. No 50. p. 74.

* * * Lord Kames's report of this case is *voce* PROOF.

1754. *July 24.*

WILLIAM HOOG Merchant in Rotterdam against KENNEDY and MACLEAN, Merchants in Glasgow.

No 31.
A merchant in Scotland

In July 1751, Kennedy and Company commissioned certain goods from Hoog, to be sent by the first ship bound for Leith, Greenock, or Borrostownness

Hoog, on the 12th of August, shipped the goods on board the Hopewell, Burton, bound for Leith, and committed the invoice to the care of the captain: He sent no bill of loading, or formal letter of advice, by course of post; but, on the 3d of September, he transmitted a copy of his account-current, wherein he took credit for goods sent by Burton for Leith as per invoice, without specifying either the goods or the ship. The Hopewell sailed from Rotterdam on the 6th of September, and next day was lost. Kennedy and Company being pursued by Hoog for the price of the goods commissioned, *contended*, That they were not liable; and *pleaded*, That Hoog, as executor of a mercantile commission, was bound to have sent bill of loading, invoice, or letter of advice, by course of post, to his constituents; and that his omission must subject him to the damage arising from the loss of the goods. Neither does it alter the case that the loss was fortuitous; for that the custom of merchants presumes, That, where damage could have been avoided, on information given, it would have been avoided. Now, the defender might, on advice, have insured the goods, and avoided the damage; without advice, he could not; Hoog must therefore be subjected to the damage, which, by his own neglect, became inevitable.

Answered for Hoog: The defences ought to be repelled; for that the commission was executed according to its precise tenor; neither bill of loading, nor letter of advice was required; and the custom of merchants is, in this case, indeterminate. Where regular posts are not established, it is impossible to send bills of loading and letters of advice; where the ship generally arrives sooner than the post, which happens in the run between Holland and Leith, it would be superfluous. But, *separatim*, the defenders might, in consequence of the advice given, have insured the goods. Advice was timeously given, That goods were shipped on board a vessel, commanded by Burton, and bound for Leith; the defenders knew that the goods in question were the only goods commissioned by them from the pursuer, they might therefore have insured them; for that, although the voyage must be specified in the policy of insurance, the extent of the premium depending upon it; yet the name of the vessel and of the commander need not.

"THE LORDS found the defenders liable, and also found expences due."

Act. J. Dundas, A. Lockhart.

Alt. J. Dalrymple.

Clerk, Justice.

D.

Fol. Dic. v. 4, p. 59. Fac. Col. No 113. p. 168.

* * * Lord Kames reports this case:

UPON the 12th July 1751, Kennedy and M'Lean wrote to Mr Hoog, merchant in Rotterdam, and commissioned from him two butts bright madder, and 300 pounds tartar, to be sent by the first ship to Greenock, Leith, or Borrowstounness. Upon the 12th of August, these goods were put on board the Hopewell, Captain Burton master, for Leith, without any bill of lading, invoice, or letter of advice. On the 14th of September, Mr Hoog transmitted to his cor-

No 31.
having ordered goods to be sent him from Holland, and the ship in which they were sent having been lost, he was found liable for the price of them, although no bill of lading, or letter of advice had been sent.

No 31.

respondents their account-current, in which was engrossed the goods commissioned, mentioned to be sent *per* Burton for Leith. It appeared after, that Burton had sailed from Rotterdam 25th August, and, on the 4th September, was shipwrecked on the coast of Holland. A process being brought for payment of the price of the goods commissioned; the defence was, That if the pursuer had sent a letter of advice *debito tempore*, the goods would have been insured; and, therefore, that his neglect must subject him to all hazards. And, in support of this defence, it was laid down as a general rule, that it is the indispensable duty of factors and others who deal by commission, to give regular notice of the shipping of the goods by course of post, and also to transmit a copy of the bill of lading. It was *answered*, That this general rule suffers many exceptions; in particular, that in small commissions from this country to London or Holland, there is no such thing in practice as regular letters of advice by course of the post; and that such regular advice would, especially from Holland, be an useless piece of form; because, for the most part the ship arrives at Leith before the letter can come by the course of the post. The pursuer insisted upon another circumstance, that he did not deal by commission, nor stated any commission, but furnished the goods to the defenders at the same price he furnished them to the factors and others in Holland.

“THE LORDS repelled the defence, and decerned.”

The pleadings in this case being extremely loose, I shall endeavour to put it in its true light. The pursuer insisted, that he was not bound to send a letter of advice. *Ergo*, Whatever damages might have happened by want of that advice, he would not have been liable. For example, had the ship arrived at Borrowstounness, and the goods been lost in the landing, or after they were landed, for want of care, the pursuer by his argument would not have been answerable. This is surely pleading the point too high. If regular advice may possibly prevent loss, it clearly follows, that it is the duty of the factor or merchant to give advice. In the present case this step was indispensable, where the commission was to send the goods either to Greenock, Leith, or Borrowstounness; for without advice the defenders could not know where to expect their goods. This point being established, the only remaining point is, Whether the factor's neglect of duty will subject him to every damage that might possibly have been prevented by a regular advice, or only to the damage which is the necessary consequence of neglecting to give advice? This question is easily determined; for I take it to be a general rule in all other affairs, as well as in commerce, that neglect of duty subjects the party to every risk and to every damage, except what he can show must necessarily have happened though he had done his duty. Upon this reasoning the interlocutor is well founded; for the pursuer made it evident, that the goods must have perished though he had done his duty. The letter of advice he sent, though late, yet gave the defenders an opportunity to insure, if they thought this measure proper; because they did not hear of the shipwreck for some time after this letter of ad-

vice came to hand. They did not, however, insure; and from this it was justly presumed, that they would not have insured though they had got the most early advice.

No 31.

Sel. Dic. No 67. p. 90.

1758. December 12.

COUNTESS-DOWAGER of GLASGOW against JANET THERMES.

LADY GLASGOW being to send some looking-glasses from Edinburgh to Glasgow, gave express orders to the carriers of them, who were employed under Janet Thermes, a carrier, to carry them upon horseback, and not in a cart; which orders were promised to be obeyed.

No 32.
Carrier breaking agreement, liable for every hazard.

The carriers, however, put them upon a cart above meal. When they arrived at Glasgow, they were found to be broke.

In a process at my Lady's instance against Janet Thermes, for the value of the glasses, Janet Thermes proved, that the glasses were so insufficiently packed in the frames, that they could hardly fail to have been broke though carried on horseback.

"THE LORDS found Janet Thermes liable."

Act. Miller.

Alt. Ja. Dalrymple.

J. D.

Fol. Dic. v. 4. p. 59. Fac. Col. No 144. p. 261.

1771. February. OGILVIE against Ross and Wood.

No 33.

OGILVIE at London, sent a cask of apples to his brother at Edinburgh, directed to William Ogilvie, Esq; by the ship Adolphus, Ross master. Ross, who brought the apples safe to Leith, could not find, from the vague direction of Esquire, where to send them, but allowed Wood, a factor in Leith, to take them into his custody, where they remained some months till they were spoiled; after which Ogilvie discovered them, and pursued both Ross and Wood for their value.—THE LORDS at first found Wood liable; but, on review, when it appeared that the loss was owing to Ogilvie at London not sending a bill of lading, and that Ogilvie at Edinburgh had not made sufficient timeous enquiry about the parcel, the Court altered and assoilzied. See APPENDIX.

Fol. Dic. v. 4. p. 59.

1771. December 10. BURNET *against* CLERK.

No 34.

A FARRIER being employed to attend a horse that was diseased, the owner directed him to give the horse no medicine but nitre. The farrier accordingly gave the horse nitre ; but, to make him swallow it more easily, mixed it with a little treacle. The horse died next day ; and the owner brought an action for the price, in respect the farrier had gone *ultra fines mandati*, in mixing treacle with the nitre. The COURT, however, were of opinion, that the defender had not gone *ultra fines mandati*, but that the mode followed was necessary to fulfil the orders given, and therefore assoilzied.

. This case is No 8. p. 8491. *voce* MANDATE.

1791. May 20. COOPER *against* GREEN and CHATTO.

No 35.

COOPER, a painter in Leith, gave an order in October, to Snowball, the rider of Green and Chatto of Newcastle, for a barrel of lintseed oil. The oil was shipped 19th December, but the vessel did not sail till the 24th, and next day, the 25th, which was the earliest post-day, Green and Chatto wrote to Cooper, inclosing the bill of lading and invoice, which were received by Cooper on the morning of the 27th. Next day, the 28th December, Cooper got intelligence that the ship was wrecked, and cargo lost. In an action for the price of the oil, the defender urged the improper delay of executing his commission, and likewise the delay of acquainting him of the oil being put aboard, which ought to have been done the same day that it was shipped ; and *insisted*, that, on these accounts, he was not liable for the price.—THE LORDS were of opinion, that where no time is specified for the execution of a commission, a reasonable discretion is allowed, and found there was no *mora* of acquainting Cooper of the goods being shipped ; it being the common practice to send the bill of lading and invoice only upon the sailing of the vessel : They therefore found Cooper liable in the price. See APPENDIX.

Fel. Dic. v. 4. p. 60.

1791. July 1, SMITH *against* MACPHERSON.

No 36.

MACPHERSON at Inverness commissioned a quantity of earthen ware from Smith of Burslem, and desired that they might be sent from Burslem to Hawley's wharf, London, in packages, directed for the purchaser at Inverness, to

No 36.

be shipped by the first vessel for that port. Smith, on the 22d September, sent Macpherson the invoice, acquainting him, that the goods had been sent, in five packages, to Hawley's wharf, according to order. Macpherson did not write to Smith for several months; but, in the following April, he informed Smith's clerk or rider, then at Inverness, that only four of the packages had arrived, and even these deficient in several articles: That these had not come to hand till the preceding February, and that was in consequence of his causing a correspondent at London make enquiry after the goods, which were found not at Hawley's wharf, as ordered, but at a different place, lying utterly neglected, and one package amissing: In these circumstances, he refused to pay for more than he had received. Smith, in an action for the price of the whole commission, offered to prove, that he had sent the goods by the ordinary conveyance to London, directed to Hawley's wharf, and had written to Messrs Hawleys about them, desiring they might be shipped for Inverness; and therefore insisted, That they were not at his risk.—THE LORDS were of opinion, That Macpherson had failed in his duty, in not acquainting Smith of the non-arrival of the goods within a reasonable time after receiving the invoice, by which means he had prevented the latter from taking any measures to trace them. And they therefore found Macpherson liable for the value of the whole.—See APPENDIX.

Fol. Dic. v. 4. p 60.

1795. January 15. CLAUDE SCOTT against MACKENZIE and LINDSAY.

IN the beginning of 1793, Mackenzie and Lindsay, merchants in Dundee, sold a cargo of wheat, for behoof of Claude Scott, corn-factor in London, and took bills from the purchasers, payable two and three months after date. They then transmitted to Mr Scott an account of the sales, in which they charged him two and a half per cent. for commission, and one and a half per cent. on account of their undertaking the risk *del credere*,

Having been urged by Mr Scott for a remittance, before the bills became due, they, after having in vain, as they alleged, applied to the Bank at Dundee, and to the Royal Bank at Edinburgh, for that purpose, on the 20th March 1793, discounted the bills with Bertram, Gardner, and Company, then in good credit, (and with whom they had other transactions about the same time), for a bill drawn on Baillie, Pocock, and Company of London, payable to the order of Mackenzie and Lindsay, seventy-five days after date. The latter indorsed and transmitted this bill to Mr Scott, who made no objection to the remittance being made in this way.

The bill was regularly accepted; but, before it became due, both the drawers and accepters had stopt payment.

No 37.

A mercantile company in Scotland, sold grain for a merchant in London, on a commission *del credere*, and took bills for the price, which, before they became due, they discounted with a private banking-house in Edinburgh, then in good credit, who drew a bill on London for their amount, payable to the order of

No 37.
the Scotch
Company,
who indorsed
and transmit-
ted it to their
employer.
The drawers
and accepters
of this bill
having be-
come bank-
rupt, before
the term of
payment, the
Scotch Com-
pany were
found liable
for it.

Upon this, some correspondence took place between Mr Scott and Mackenzie and Lindsay, in which the latter undertook to pay the bill, and requested the delay of a month or two, that they might be able to do so, without inconvenience. Being afterwards, however, advised, that they were under no legal obligation to pay it, they brought a suspension, in which they

Pleaded; The obligation of a factor charging a commission *del credere*, extends only to warrandice of the solvency of the purchasers from him, and is at an end when the money is recovered from them, for which the factor no doubt is liable to account to his constituent; but if the latter desires it to be remitted to him, a new and separate mandate takes place, in which all that is incumbent on the factor is, to transmit a bill on a house responsible at the time, whose solvency he is not obliged to warrant, unless he be allowed a new commission on that account.

In the present case, it was entirely owing to the charger's anxiety to have his money before the original bills fell due, that recourse was had to the house of Bertram, Gardner, and Company, or any loss occasioned.

Nor, in a question between the present parties, does the bill being drawn in favour of the suspenders, and being afterwards indorsed by them, make any difference. They acted merely *factorio nomine*. They would have done all that was incumbent on them, if they had taken the bill payable directly to Mr Scott, who can qualify no loss from their having adopted a different method. It will not be presumed, that they meant gratuitously to undertake a new obligation. The same observation applies to the letters which were written by the suspenders, under an erroneous impression, that they were antecedently liable for payment of the bill.

Answered; A person whose goods are sold at a distance from the place of his residence, and who is necessarily often ignorant of the situation of those with whom his factor must enter into contracts, has equal reason to wish to have the safety of the remittances warranted to him, as the solvency of the purchasers; and accordingly, the commission *del credere* extends equally to both; Beawes, *v.* Bills of Exchange, p. 428, 429. § 97.; Mortimer's Dict. *v.* Bills; and that such was the understanding of the suspenders, is evident from their making themselves at any rate liable for the bill, by indorsing it; 5th July 1782, Connel against Maclelland, No 76. p. 1485.; and from the assurances of payment contained in their letters,

The Lord Ordinary repelled the reasons of suspension, and found expenses due.

Upon advising a reclaiming petition, with answers, it was

Observed; That, as the charger had sustained no loss from the suspenders having indorsed the bill, and written the letters, these circumstances could no farther affect the present question, than as they tended to shew their own sense of the extent of their obligation; but that, as they had the money of the charger in their possession, or bills which they were bound to warrant to be good,

they ought to have transmitted a bill of a public bank, and had no right to make their employer incur a risk by any transaction entered into with a private banking house.

No 37.

THE LORDS, by a great majority, 'adhered.'

Lord Ordinary, *Justice-Clerk.*
Clerk, *Menzies.*

For the Charger, *Geo. Fergusson.*

Alt. *Hope.*

D. D.

Fol. Dic. v. 4. p. 61. Fac. Col. No 149. p. 341.

* * * This case was appealed :

1796. December 19.—THE HOUSE OF LORDS ORDERED and ADJUDGED, that the appeal be dismissed, and the interlocutors therein complained of be affirmed, with L. 100 costs.

No 38.

1795. December 1. BAINES *against* TURNBULL.

A FACTOR in Scotland, employed to sell goods for English merchants, was accustomed to lodge the price of the goods sold in a private banking-house, on an account in his own name, and to take from them bills drawn on their correspondent in London, payable to himself, which he indorsed and transmitted to his employers, against whom he charged two and a half *per cent.* commission. Upon the bankruptcy of the drawers and accepters, he was found liable for such bills as had not been paid by them, because he ought not to have taken the bills payable to himself, but directly to his constituents.

* * * This case is No 76. p. 1486. *voce* BILL of EXCHANGE.

1799. June 21.

ROBERT FARRIES *against* THOMAS ELDER, Deputy Postmaster-General for Scotland, and WILLIAM SCOTT, Postmaster at Ecclesfechan.

ROBERT FARRIES, on the 6th August 1798, delivered to William Scott, postmaster at Ecclesfechan, a sealed letter, for Sutherland and Company, Leith, which had 'L. 25 inclosed,' marked on a corner of it. Farries told Scott that it contained this sum, and paid 2s. 1d. as the postage of it.

It was too late for the mail of that evening; but, in Mr Scott's absence, it was next day dispatched by his wife, who, upon the letter-bill sent by the mail, wrote, 'Mr Sutherland's letter, supposed a money-letter.'

This letter was not delivered to Sutherland and Company, and it was never ascertained what became of it; but it has since been conjectured, that it had

No 39.

The officers of the Post-Office are not responsible for the safe delivery of money sent by post, where the loss of it is not imputable to the individual defendants.

No 39. been abstracted by one of the letter-carriers at Edinburgh, who was afterwards executed for a similar offence.

Farries brought an action against Thomas Elder, as Postmaster-General for Scotland, and William Scott, for recovery of the money.

The Lord Ordinary ordered memorials to the Court.

That for the defenders was printed. There was annexed to it a copy of Mr Elder's commission from the Earl of Chesterfield and Earl of Leicester, as holding jointly the office of his Majesty's Postmaster-General, by which he was appointed 'Deputy Postmaster-General for Scotland.'

It was likewise stated in the memorial, that the postage of letters is invariably fixed according to their weight, and that no additional charge is ever made on account of their containing money,

No memorial was lodged for the pursuer, who proposed to desert the action. But the Court having recommended to the Post-Office to defray the expence of trying the question, a hearing in presence took place, and the pursuer

Pleaded; Before the establishment of the General Post-Office, the conveyance of letters was intrusted to private carriers, who were responsible for the safe delivery of them, in terms of the edict *Nauta, caupones, &c.* When the public afterwards assumed the exclusive right of carrying letters, the same responsibility of course followed; Edgar, 28th July 1724, Short against Hamilton, No 26. p. 10091.

The Scottish was incorporated with the English Post-Office by 1710, c. 9. Various subsequent statutes have been passed, introducing penalties for abstracting letters; and the whole proceed upon the supposition that money may be safely remitted on paying additional postage.

When the loss happens without the fault of the officers of the Post-Office, they may indemnify themselves from the revenue derived from it, upon which this risk may be considered as a necessary burden.

Answered; If the pursuer had been able to establish, that the loss had been occasioned in consequence of any fault personal to either of the defenders, his claim would of course have been well founded; but this not being pretended, there is no room for the general responsibility contended for by him.

The situation of the public or of the defenders, cannot, with propriety, be assimilated to that of carriers. The latter are entitled to insist, that the contents of any inclosures sent by them shall be ascertained in their presence, and make their charge in proportion to the risk in each case, which cannot be done at the Post-Office.

The salaries of the defenders, too, are quite inadequate to the responsibility ascribed to them. Indeed, it would be essential to such obligation, that they should have the sole appointment of the persons through whose hands letters necessarily pass before delivery. But so far from this, the defender Scott had no concern with the letter after it was dispatched. Mr Elder is himself a deputy; and although his recommendation is attended to in the appointment

of inferior officers, his choice must be approved of by the Postmaster-General, and even he is under the controul of the Lords of the Treasury.

Inferior officers, on their appointments, take the oaths of allegiance and fidelity, find security to the public for their conduct, and are in every respect public officers. Their superiors are no more liable for them, than the Lords of the Treasury, the Commissioners of Excise and Customs, &c. are for inferior officers in their departments. None of the statutes relating to the Post-Office, give any countenance, in a case like the present, to a claim either against the revenue or the officers of the Post-Office. On the contrary, the revenue arising from it, after deducting the expense of management, is appropriated to public purposes; and, for the security of the conveyance, severe penalties against malversation are introduced; 9th Anne, c. 10.; 5th Geo. III. c. 25.; 7th Geo. III. c. 50. The incompetency of a claim like the present, is fixed in England by repeated decisions; *Raymond, v. r.* p. 641. Lane against Potter and Frankland; *Cowper's Reports*, p. 754. King's Bench, Easter Term 1778, Whitfield against Postmaster-General.

The cause was reported by Lord Balmuto, probationer.

The COURT, on the grounds stated for the defenders, and particularly the English decisions, unanimously assoilzied.

Lord Ordinary, *Craig*.

Act. D. *Catbcart*.

Alt *Boyle*.

Clerk, *Pringle*.

D. D.

Fac. Col. No 130. p. 297.

1799. June 21.

HENRY SWINTON against WILLIAM BEVERIDGE, Solicitor of the General Post-Office.

No 40.

A letter-carrier of the General Post-Office having abstracted some bank-notes from a letter, and put two of them into circulation before he was detected, the solicitor of the Post-Office paid value for them to the holders, and lodged them with the clerk of Justiciary as evidence against the

JAMES STEWART, one of the letter-carriers of the General Post-Office at Edinburgh, abstracted from a letter five notes of the Falkirk Banking Company, for L. 20 each, which had been transmitted by Henry Swinton of Grange-mouth, for Thomas Gladston and Son of Leith.

Stewart, before being detected, had put two of the notes into circulation, and one of them had come into possession of Sir William Forbes and Company, and the other of Messrs Kinnears, bankers in Edinburgh.

William Beveridge, solicitor of the Post Office, afterwards received the notes from them, on paying their full value, and lodged them with the Clerk of Justiciary, as evidence against Stewart.

After his conviction, Messrs Swinton and Beveridge presented petitions to the Court of Justiciary, each claiming the notes.

The Court refused both petitions, but 'granted warrant to, and ordained the clerk of Court to deliver up the money lodged with him to the person who shall be found to have right thereto, upon his receipt.'

No 40.
letter-carrier.
After his con-
viction, the
original own-
er of the
notes was
found to have
no claim for
recovery of
them.

A multiplepointing was accordingly raised in the Court of Session, in which Messrs Swinton and Beveridge were called as defenders. The former

Pleaded; By a salutary regulation of the law of Scotland, the expense of criminal prosecutions, at the instance of his Majesty's Advocate, is defrayed by the public.

In offences against property, one branch of this expense, and which may greatly exceed the value of the subject, frequently arises from recovering the property abstracted, in order that it may be used as evidence against the culprit. This, however, cannot effect the right of the person defrauded, to recover his property after conviction, otherwise, contrary to the rule of law, he would be indirectly subjected to part of the expense of the prosecution.

It is unnecessary to inquire how far bank-notes, in possession of a third party, acquiring them *bona fide*, are subject to a *vitium reale* at the instance of a former owner, from whom they have been fraudulently abstracted; (See Ersk. b. 3. t. 1. § 10.; Stair, b. 1. t. 7. § 1. 11.); because here the only competition is between him and the public, the latter having recovered the abstracted property to be evidence against the offender; and the former insisting, that no part of the expense of the conviction shall be defrayed by him.

Answered; It is completely fixed, from views of commercial expediency, that an onerous holder of money, bank notes, or bills of exchange, is liable to no extrinsic objection; Bankt. v. 1. p. 218.; 24th February 1749, Crawford against Royal Bank, No 2. p. 875; Bur. Reports, v. 1. p. 452, Miller against Rare; Douglas's Reports, p. 611, Peacock against Rodes; and Mr Swinton clearly would have had no claim against the bankers, from whom the notes were purchased. No right can arise to him from the purchase, which took place *bona fide*, and from which he sustained no prejudice.

The public is not responsible for the safe transmission of letters, (see preceding No.), or obliged to purchase stolen goods, and restore them to their former owner.

If the present claim had been suspected, instead of purchasing the notes, the object of the prosecution would have been obtained by a warrant on the holders for production of them; and there could have been no doubt of their right to recover them after the trial. The solicitor of the Post-Office is precisely in their place.

The Lord Ordinary reported the cause on memorials.

The Court unanimously preferred Mr Beveridge on the grounds stated for him.

Lord Ordinary, *Methven*.
D. D.

For Swinton, *Ar. Campbell*.

Alt. *Boyle*.

Clerk, *Hume*.

Fac. Col. No 131. p. 300.

S E C T. IV.

Betwixt Proprietor and Custodier.

1734. December 21.

JOHN CAMPBELL, Taylor in Edinburgh *against* CHARLES M'CLARIN.

A BURGESS of Edinburgh, who had a country-house some miles from the town, was in use, when his family was not there, to trust the key of his outer door with his gardener. Some goods in a chest of drawers, to the value of L. 5, being stolen, while the master was in town, the servant was found liable for the same, though it was not pretended, that he, or any of his family, had committed the theft; and though it was *pleaded* for him, That he was liable in no sort of diligence further than to keep the outer door locked: But the LORDS went upon this circumstance, that he had been *versans in illicito*, in so far as one night he had lodged a travelling packman in the house, which they thought sufficient to throw the burden upon him, though he made out clearly, that the packman could not be the person who stole the goods. See APPENDIX.

No 41.

Fol. Dic. v. 2. p. 59.

S E C T. V.

Betwixt Merchant and Shipmaster.

1677. November 7.

LAWRIE *against* ANGUS.

THOMAS LAWRIE, merchant in Edinburgh, having obtained decret against James Angus, skipper in Leith, for 500 merks, for the damage of a box of silk ware, which was wet by the leakage or spouting of the pump, and L. 100 for detaining the said Thomas's ware, and not delivering the same at the arrival of the ship, though he required it, and offered the freight; James the skipper suspends, and raises reduction on these reasons, *imo*, That the Baillie had done wrong in repelling this defence, that the ship and pump were sufficient at the embarking of the goods; and that the merchant himself was present in the ship with the goods, and that this box damaged was stowed in a secure place in.

No 42.

A shipmaster found liable for the damage of silk put near the pump, altho' the merchant was on board during the voyage.

No 42.

the ship, but that the merchant himself caused change it from that place, and placed it near the pump; for the freighting of goods in a ship being *locatio* and *conductio*, where there is a mutual benefit to both parties, the locator is only liable *pro media diligentia*, and *propter culpam levem sed non levissimam*; so that here the skipper having done what a provident skipper ought to do, viz. to have a tight ship and a sufficient pump, he was not liable for any damage, though it had been possible to prevent the same by the most exact diligence, much more when the damage is by the fault of the merchant choosing a place near the pump, and specially where the damage is *ex casu fortuito et improviso*, viz. that the pump being sufficient at the loosing, a split or rift was broken therein upon the voyage, which no man could foresee; and if the skipper should be liable for such accidents, it would discourage navigation, the necessary mean of commerce, and there is no location where less enquiry should be made of diligence, which must be presumed, seeing the skipper ventures his own life and ship, and therefore must be presumed to take narrow inspection and care of the sufficiency of the ship. It was *answered* for the merchant, That albeit it be the common opinion that locators are not holden for the highest fault, yet there are specialities as to masters of ships and seamen by the edict *nautæ cautiones stabularii*, &c. and many other of the Roman laws; for thereby it is clear, that if any thing be lost, lacerated, or spoiled in the ship, by whomsoever, the owners or master are liable simply, and will not be freed upon pretence of any diligence; and therefore, by the custom of all maritime courts, the skipper is still liable to restore goods as he received them, without any damage, except what occurs by stress of weather, whereby a ship may be extraordinarily shaken, or by any disabling of the ship by touching upon a rock, sand-bank, or piracy; but as to the case in hand, the bill of lading is produced, bearing the receipt of the ware, good and well conditioned, to be restored in like condition, adventure and hazard of sea being only excepted, which clears a special contract betwixt merchant and skipper, by which the skipper *suscepit periculum*, except only the hazard of sea, viz. stress of weather, naufrage, or the like, which being the common style of bills, settles the case betwixt merchant and skipper, and being an exception of sea-hazard only, puts all other hazard upon the skipper; so that it will not be sufficient for the skipper to prove that there was no perceivable fault in the ship or pump when he loosed from his port, but he must instruct an extraordinary hazard, as being shaken with storm; but if a leak break up in his voyage, without stress of weather, the merchant runs no hazard therein, much more if his pump split or spout when he hath received in fine ware; and if it were otherways, traffick would be exceedingly discouraged, for the sufficiency of the ship, and the incident leakage, could only be probable by seamen, which the law terms *improbum genus hominum*, and who are the master's own servants; neither doth it alter the case that the merchant was aboard, for he neither did nor was obliged to notice the insufficiency of the ship, which lay on the skipper's trust and peril, neither did he order his goods

to be set by the pump, and though he had, all the ship ought to have been tight, and at least the master or seamen ought to have signified the danger of being near the pump, that the merchant might directly or tacitly have taken his hazard; and by the act 14th. Parl. 1466, it is statuted, that no ship be freighted without a charter-party, containing therein the several articles therein expressed, especially that no merchant goods be riven or spilt with unreasonable stowing, &c.

THE LORDS, before answer, having appointed probation, *binc inde*, in what condition the pump was in at loosing; if it had a stillege of timber about the pump, and if it was the ordinary custom to cover such stilleges with pitched canvas, and if this was so covered; and how it came in the voyage to spout, and if there was any stress of weather or accident at sea; and if the merchant choosed to set his ware by the pump, and if the hazard was signified to him; the probation being closed and advised, it was found, that the merchant choosed not to set his goods by the pump, and that the seamen could perceive no fault in the pump when they loosed, but that there broke up a rift or split in the voyage, and that the weather was fair all the time of the voyage, without any stress or accident; whereupon the LORDS ordained either party to be ready to debate that point, whether the hazard of leakage, and such ordinary hazards as occur not by stress of weather, but only from the ship and her furniture, lie upon the merchant, or the skipper and his owners; and having heard them at length thereupon, they found that these ordinary hazards not arising from stress of weather, or any such extrinsic accident, but from the condition of the ship, lie not upon the merchant, nor are relevant to free the skipper, who must have his ship sufficient at his peril; and found no difference whether the merchant were aboard or not.

Fol. Dic. v. 2. p. 59. Stair, v. 2. p. 553.

* * * Fountainhall reports this case:

THOMAS LAWRIE, merchant, convenes Angus, skipper, on the 14th act, Parl. 2d, James III. for spoiling his goods with sea water. THE LORDS found the skipper liable for the damage, as not being wholly *ex casu fortuito*. *Vide Peckius de re nautica*, (p. 815.;) for the skipper had here laid the goods under the pump, and altered them from the place where they were first laid.

Fountainhall, MS.

1680. July 24.

COLIN LAMONT, Skipper in Kirkcaldy, against HENRY BOSWELL,
Merchant there.

No 43.

A CHARGE on a charter party for the fraught. *Alleged* their goods were damaged by two leaks, sprung in his ship. *Answered*, That was *casus fortuitus* not

No 43.

to be imputed to the skipper, his ship before sailing having been visited and found sufficient. THE LORDS, after allowing, before answer, a mutual probation of the damage, found the skipper liable, unless he could prove the leaks were struck up by a storm, or other stress at sea; for else merchants following the skipper's faith, that the ship is good and tight, might be ruined.

Fol. Dic. v. 2. p. 59. Fountainhall, MS.

* * * Stair reports this case :

By charter-party betwixt Boswell, Provost of Kirkcaldy, and Colin Lamont, skipper, the skipper was obliged to have his ship tight and in order, and to perfect a voyage from Kirkcaldy to Dantzick, and homeward, for which Boswell was to pay him 800 merks of freight; whereupon Boswell being charged, he suspended upon this reason, that he having embarked sixteen packs of lint in Dantzick, ten packs of it was spoiled by sea water in the Road of Dantzick, and thereupon was sent a-shore, and brought home by another ship. It was *replied*, That this was *casu fortuito*, by a leak which struck up in the ship, for she was tight both when she loosed at Kirkcaldy, and was repaired at Dantzick, before the lint was embarked. It was *duplicated*, That the skipper having hired the ship to a merchant for import and export of ware, he was answerable for all damage the ware should sustain; and by the law, *nautæ, caupones, stabularii ut recepta restituant, &c.* which is in vigour by our custom, The masters and owners of ships are liable to the merchant for all damage by a leak in the ship, or otherwise, except it were occasioned by extraordinary stress of weather at sea, which could not be prevented; but if an ordinary leak should liberate the skipper, it would ruin trade, for the skipper should know the condition of his ship, which the merchant cannot, and therefore the craziness of the ship, or any thing arising therefrom, must be upon the skipper's peril.

THE LORDS having, before answer, ordained witnesses to be adduced by both parties upon the damage, and the cause of it; which being this day advised, it was proved that the ship was repaired at Dantzick, before embarking of the lint, and yet in that Road a leak struck up, and spoiled ten packs of the lint; and seeing no extraordinary accident was proved, either by stress of weather or otherwise, the LORDS found the skipper liable for the damage.

Stair, v. 2. p. 791.

1680. July 30.

LUMSDEN, Skipper in Aberdeen, against ROBERT LORIMER, Merchant there.

No 44.

ALLEGED no freight due, because its an uncontroverted maxim in maritime law, *quod naufragio facto naulum non debetur*. Answered, The skipper cannot answer for this *casus fortuitus*, and though the ship was broke, yet the loading

was saved. THE LORDS found the freight due, deducting as much thereof, as the merchant should instruct he was damnified by the landing of the ship in the place where she broke, and tried the damage, by comparing the price of the loading as it was sold in the place it was cast in, with the prices it would have given in Aberdeen, which was the port to which they designed.

No 44.

Fol. Dic. v. 2. p. 59. Fountainhall, MS.

1732. February 12.

LUTWIDGE against GRAY.

By charter party, a shipmaster having become bound to transport a loading of tobacco from Virginia to Port Glasgow, and the merchant to pay a certain freight per tun; the ship in her return was wrecked on the coast of Ireland, but most of the cargo was saved and got upon shore, some of it much damnified. So soon as the freighter got notice of this disaster, he sent an agent to Ireland, who, upon paying salvage, got the goods delivered to him; some of them he shipped for Bristol, in order to be abandoned to the insurers, the remainder he carried straight to Glasgow. In a process for the freight, the LORDS found, That the contract of affreightment was dissolved by the total loss of the ship, albeit some of the shipwrecked goods were saved out of the shipwreck; and that the freighters indorsing the bill of lading to the insurers did not subject the freighters to any freight for the goods recovered by the insurers; but found the merchant liable for the freight *pro rata itineris* of such of the goods as were brought to Glasgow, notwithstanding that part of the tobacco was found damnified and burnt there. See APPENDIX.

No 45.

Fol. Dic. v. 2. p. 46.

1802. January 15. HESELTINES against ARROL and COMPANY.

In the month of January 1800, Arrol and Company, grocers in Edinburgh, gave an order for three chests of tea to the agent of Messrs Edward and Thomas Heseltine, wholesale tea-dealers in London. They accordingly sent to the wharf at London the tea, as commissioned to be shipped for Arrol and Company by the Berwick Shipping Company, who employ a number of packets in the trade between London and Leith.

They were informed, that the goods would be put on board the Kelso Packet, Robert Moir, master. Accordingly, the invoice was made out in these terms, and a letter of advice to this effect was dispatched, (6th February 1800,) to the defenders. Upon sending, however, again to the wharf in the evening, they learned from the wharfinger, that the tea would be sent by the Union Packet. They therefore altered the invoice, and deleted the name of the vessel, "Kelso,

No 46.

Goods shipped upon commission by a London merchant are at the risk of the consignee, altho' there be a mistake in the invoice.

No 46. Robert Moir, master," and inserted " the Union, John Paterson ;" by which vessel they understood the goods were to be sent.

After all, however, from some accident, the tea was shipped on board of the Kelso instead of the Union, and, in the course of the voyage to Leith, the vessel was stranded ; two boxes of the tea were lost, and, upon the 14th of March, one box was delivered in a damaged state to the defenders. They received the tea ; but, at the same time, protested, that Heseltines should be liable in every damage that might have been sustained by not dispatching the tea according to the advice given, and that they should only be responsible for the value of the box of damaged tea which had arrived. They immediately transmitted a copy of this protest to the pursuers.

Heseltines and Company, upon this, brought an action against Arrol and Company, for payment of the full value of the tea which had been shipped, with interest from the time at which the price should have been paid.

The LORD ORDINARY reported the cause, and the pursuers

Pleaded, By delivery of the goods at the wharf, and obtaining an invoice, the commission is understood to be executed ; for the duty of the London merchant is merely to deposit his goods safely in the hands of the wharfinger, who becomes responsible for any subsequent damage, from whatever cause it may have arisen. The pursuers are nowise responsible for the conduct of the wharfinger ; it does not, however, in this case, appear, that he is at all liable. It is impossible, from the nature of the thing, to calculate precisely the quantity of goods which each vessel is able to take, so as to determine previously by what particular ship any parcel may be dispatched. The universal practice in the trade, therefore, is, to insure " on ship or ships." The pursuers had, on former occasions, given notification of this in the course of their dealings with the defenders ; and it is the mode of insurance adopted universally by the traders from London to Leith. *2do*, The defenders are not able to show, that any damage has arisen from the improper designation of the vessel ; because not having executed any insurance upon it, they cannot pretend that the underwriters availed themselves of the mistake.

Answered, A merchant must do his duty before he can transfer his risk to a consignee ; and in mercantile dealings, where goods are shipped, and an invoice or bill of lading duly transmitted, the risk is transferred to the purchaser. The pursuers have not discharged themselves of this risk ; for they sent the goods by a wrong vessel, and gave a false intimation ; 24th July 1754, Hoog against Kennedy and Maclean, No 31. p. 10096. This is the established practice among merchants ; and there is no reason by which the carrying trade between London and Leith should form an exception. The intimation which was said to have been given, to insure " on ship or ships," was entirely special, and referred to the particular commission then to be executed. *2do*, It is *jus tertii* in the pursuers to plead, that no insurance was effected ; for a merchant

who stands his own insurer is entitled to every argument competent to an underwriter.

No 46.

THE LORDS found the defenders liable, with expenses.

Observed from the Bench, There is a great difference in questions between merchants themselves and between the merchant and the underwriter. It is therefore very material that no insurance was effected in this case. The general nature and practice of the carrying trade between London and Leith seems to be in favour of the pursuers.

Lord Ordinary, *Polkemet.*

Act. *Erskine, Cathcart.*

Agent, *J^o. Young.*

Alt. Lord Advocate *Hope, Boyle.*

Agent, *J. Phillips, W. S.*

J.

Fac. Col. No 15. p. 30.

1802. *July 9.*

TAYLOR and COMPANY *against* HOGG.

HERCULES TAYLOR and Company, merchants in Montrose, freighted the ship *Agnes*, belonging to Alexander Hogg, to load coals in Scotland, to be delivered at Gottenburgh. The vessel was to be there loaded with iron and deals, and to return with these commodities to Montrose. The freight was to be L. 60, with two-thirds of port charges, and the agreement was completed by missives mutually subscribed by the parties. It was farther arranged verbally, that Hogg should receive from Taylor and Company, or their correspondent, such money as he might have occasion for, to account of the voyage.

No 47.
When a ship
is taken on
the homeward
voyage,
freight is not
due.

Accordingly, Hogg sailed from Scotland with the coals, which were duly delivered at Gottenburgh. He there loaded his vessel with iron and deals, but during the course of his voyage homeward, was captured by the enemy. At the port in Scotland where he took the coals on board, he received one guinea to account of the loading, and he received L. 30 at Gottenburgh to account of the voyage.

Taylor and Company brought an action before the Admiral for repetition of the sums which had been advanced, and the Judge-Admiral assolized the defender (May 19th 1797). This decree was brought before the Court by reduction, and the pursuers

Pleaded; The voyage to Gottenburgh and back again was understood by the parties to be one voyage. The loss is total. No freight therefore is due; *Malynes*, p. 98, 100; *Molloy*, b. 2. ch. 4. § 7; *Bankton*, b. 1. tit. 18. § 22; *Erskine*, b. 3. tit. 3. § 17. It makes no difference, that coals were carried out; the value of such a cargo is in this case so trifling, that it may be considered little else than ballast. The object of the voyage was to bring iron and deals from Gottenburgh. Since no freight could be due till the whole voyage out and home was completed, the master *in petitorio* could not have claimed it; and the

No 47.

pursuers are equally entitled to a restitution of the sums which they advanced to him on that account; L. 15. § 6. *D. Loc. Con.*; Voet, § 27. *b. i.*

Answered; This is not to be considered as one voyage; for there were two cargoes, and two ports of delivery. Neither is the loss total: The outward bound cargo of coals was safely delivered, and sold at Gottenburgh for the benefit of the pursuers. The defender is therefore entitled to freight *pro rata itineris*; Lutwidge against Gray, February 12th 1732, No 45. p. 10111; and this claim cannot be affected by the subsequent capture of the vessel without any fault of his; Kames's Principles of Equity, b. 1. part 1. c. 4. § 8; Burrow's Reports, vol. 2. p. 882. The comparative value of the cargoes, as it makes no difference in the trouble of the voyage, can make no difference with respect to the freight due to the master. He had, therefore, a good claim *in petitorio*; much more *in possessorio*, where payment has been received on equitable grounds.

THE COURT, by a great majority, sustained the reasons of reduction, and reduced, decerned, and declared accordingly.

It was *observed* on the Bench; The rule, that no freight shall be due, unless the whole voyage out and home be completed, though it may sometimes occasion hardship, is, on the whole, a salutary regulation, by tending to preserve useful lives. The loss was total; for the outward bound cargo, which in this case was of trifling value, is understood to be vested in the homeward bound cargo, and was accordingly lost along with it. The opinion of the Judge-Advocate of the High Court of Admiralty in England, which had been submitted to the Court, seemed to be in favour of this doctrine.

Lord Ordinary, *Balmuto.*

Act. *Hodshon-Cay.*

Agent, *Ro. Jameson, W. S.*

Alt. *Baird.*

Agent, *J. O. Brown, W. S.*

Clerk, *Menzies.*

J.

Fac. Col. No 57. p. 120.

1803. June 15.

SPROT against BROWN and OTHERS.

No 48.

A shipmaster who receives a mirror on board, and grants a receipt for it, without examining its condition, is liable in damages to the owner, if it shall be found on delivery to be broken.

UPON the 18th October 1800, a large wooden case, containing a glass mirror, was shipped at London on board the *Ceres*, Michael Brown master. The package had the word "Glass" marked upon it, and was addressed to Mr William Sprott, York Place, Edinburgh. A receipt was granted for it in these terms: 'Received on board the *Ceres*, Michael Brown master, for Leith, one case, marked as *per margin*, which I promise to deliver safe; fire, and all and every the dangers and accidents of the seas, and navigation of whatever nature or kind, excepted.' This receipt was granted, and the package was put on board, without any examination of the contents.

When the *Ceres* arrived at Leith, the wooden case was immediately dispatched upon men's shoulders to Mr Sprott's house in York place, Edinburgh, ac-

cording to the direction ; and a demand was made upod him for two guineas as the freight from London to Leith, and one guinea as the carriage from Leith to Edinburgh.

Upon examination of the package, it appeared that the plate of the mirror was shivered to pieces ; but the workmanship and ornaments on the frame remained unhurt. Whereupon an action was raised before the Judge-Admiral, at the instance of Sprott, against Brown the master, and the owners of the *Ceres*, concluding that they should be ordained to replace the plate of the mirror by one of equal value and demensions, or to pay the value of the plate which had been broken.

The Judge-Admiral pronounced the following interlocutor : “ In respect that the defender Brown, and the agent in Leith for the whole defenders, repeatedly declined or evaded calling at the pursuer’s house to inspect the fragments of the broken glass, and the state of the package in which it was contained, holds them as confessed in these two points ; *first*, That the counterplate of the looking-glass libelled on was broke ; and, *secondly*, That the word *Glass* was written in large characters on sundry parts of the package case : Finds, That on receiving a package with the word *glass* written thereon, it was incumbent on the master, if he did not mean to abandon all recourse against the person shipping the goods, to refuse taking the package on board, till the shipper did satisfy that it was actually sound and entire : Finds, That by seeing the word *glass* written on such a package, he was certiorated of the extent of his risk, and had sufficient grounds to justify an extra charge on account of that risk : Therefore, finds it established, *præsuntione juris et de jure*, that the defenders must have had the extra risk in their contemplation, when they fixed the rate of freight they demanded for the carriage of the package libelled : Therefore, decerns in terms of the libelled precept, and finds expenses due.”

The defenders brought a suspension and reduction of this decree of the Judge-Admiral, and

Pleaded, A shipmaster is merely reponsible for the delivery of the precise goods which he received, and in the precise state in which he received them ; Erskine, b. 3. tit. 1. § 28. The obligation in this case is discharged, by delivering the wooden case unopened, and free from external injury. It is impossible that the shipmaster can be answerable for the state in which the commodity inclosed in this wooden case is found, as it may have been reduced to that state before it was placed on board the vessel. All for which the shipmaster is responsible, is any loss which happens on board, and which, by skill and vigilance he might have been able to foresee and prevent ; Stair, b. 1. tit. 9. § 5 ; Molloy, 1. 324. He can never, therefor, be answerable for any accident arising from the inherent defect, or the peculiar weakness of an article of such fragility, as to make it unfit to bear the motion of a vessel ; if there be either the least imperfection in its original construction, or the smallest defect in the mode of packing.

No 48.

There is no evidence that the damage was actually done while the package was on board the vessel, The mirror might have been broken before it was put on board, which is the more probable, as the case had not suffered any damage, and the ornaments on the frame remained unhurt. The safety of the frame shews, that the misfortune which happened to the glass, arose from some defect in its construction, or from some negligence in the manner in which it was packed; for neither of which the shipmaster can be answerable. The loss, therefore, must be considered as a *damnum fatale*, which the shipmaster could not prevent, and for which he is not liable.

Answered, A shipmaster who receives goods on board his vessel without objection, is bound to deliver them in good order and condition. By not examining the state of the package before it was put on board, the presumption is, that the mirror was entire at the time of shipping, and the master and owners must be accountable accordingly. The obligation incumbent upon the shipmaster can only be elided by shewing, either that the damage was done before the article came into his possession, or that it arose from some accident which could not be prevented; "by the act of God, or the king's enemies."

There is an obvious necessity for this strict responsibility, as otherwise it might be in the power of masters and ship owners to practice innumerable frauds upon the public. Accordingly, this doctrine is expressly laid down by all the legal authorities from the Roman edict, *Nauta, caupones, stabularii*, to the latest writers upon the subject; *Digest. l. 4. t. 9. § 1.*; Stair, b. 1. tit. 9. § 5. and tit. 13. § 3.; Bankton, 1. 435; Erskine, b. 3. tit. 1. § 28; Molloy, 1. 324.; Beawe's *Lex Mercatoria Rediviva*, p. 83; Abbot, p. 176.

And the general doctrine of law is, in this case, expressly confirmed by the terms of the receipt, whereby the shipmaster acknowledges himself bound to deliver the goods "safe" at the place of their destination.

The Lord Ordinary found the letters orderly proceeded in the suspension, and assoilzied from the conclusions of the reduction, with expenses.

To which judgment the Court adhered unanimously, upon advising a petition, with answers.

Lord Ordinary, <i>Polkemmunt</i>	For the Suspender, <i>Gillies.</i>	Agent, <i>Jo. Peat.</i>
Alt, <i>Baird.</i>	Agent, <i>Jo. O. Brown, W. S.</i>	Clerk, <i>Home.</i>

J.

Fac. Col. No 109. p. 240.

S E C T. VI.

Hazard of Consigned Money.

1631. December 7.

GRIERSON *against* GORDON.

No 49.

WHERE the reversion bears the money to be consigned in case of a refusal, in a responsible landed man's hands, and does not contain the name of any special man ; when declarator is sought upon consignation, the pursuer of the declarator must produce or pay the consigned money, and must pursue the person for the same, in whose hands it was consigned, and the defender will not be put to pursue the consignatar, because the pursuer or consigner may make choice of the person himself, and he must make it furthcoming.

Fol. Dic. v. 2. p. 59. Auchinleck MS. p. 208.

* * * Durie reports the same case :

1631. December 7.—IN a redemption of lands conform to a reversion, the defender alleging, that no declarator could be granted before the money, whereupon the lands were redeemable, with the annualrent of all years since the consignation, were exhibit to be given in unto the defender ; and the pursuer replying, that he could not be compelled thereto, seeing he had consigned the same according to his reversion in a responsal man's hand, within the parish, as the reversion appointed, where it has ever since remained unuplifted by the pursuer, and he has no power to compel the depositar to exhibit the same : THE LORDS found, that the declarator of redemption should proceed, but before extracting of sentence, the money should be exhibited to be given up to the defender ; and therefore they ordained letters to be direct at the pursuer's instance, and also at the defender's, if he please to charge the depositar to exhibit the same, to the effect foresaid ; but the LORDS found the pursuer was not astricted in any annualrent for the money since the consignation, seeing that it was never alleged, that the pursuer had uplifted the same, or made any use thereof, but that it has lain still in the depositar's hands ever since.

Act. Miller.

Alt. Gilmour.

Clerk, Hay.

1632. January 21.—IN a redemption, whereof mention is made, December 7. 1631, the depositar being charged, as was ordained and mentioned the day foresaid, to exhibit the money consigned, by letters under pain of rebellion, and he not having obeyed, by exhibiting the same, nor yet suspending the charge ; the party desiring the Lords to direct letters simply against him, to denounce

No 49.

him; and it being controverted, if such letters should be direct so summarily, the depositar not being called in this process of redemption, nor any compearance made for him, but that it was called in doubt, if horning could so proceed, except that he had been convened and pursued in some ordinary action for the money, where it might be lawfully tried if the money was really consigned and remained still in his hand; for as the instrument of the alleged consignation was not enough, nor could not be found enough, if he being pursued for the money, denied the consigning thereof; so it could not be found enough now, he not being heard, nor pursued *via ordinaria*, to be put to the horn for the same; notwithstanding whereof the Lords found, that letters of horning should be direct to denounce him, seeing he suspended not the first charge; albeit it was granted only *incidenter* against him in an action of redemption, wherein he was not called, nor was a party.—See REDEMPTION—SUMMAR DILIGENCE.

Durie, p. 604. 613.

1665. July 28.

SCOT against SOMERVAIL.

No 50.

BESSY SCOT having charged Somervail, who was cautioner in a suspension, for payment of a sum of money contained in a bond suspended; he suspends on this reason, That the money was consigned in the hands of Mr George Gibson, clerk to the bills for the time. It was *answered*, That Mr George Gibson was now out of office, and insolvent, and the consignation behoved to be upon the peril of the consigner. It was *answered*, That the consignation must be upon the peril of that party who was the cause of consignation, and that was the charger; in so far as it was instructed by an instrument produced, that the suspender offered the annualrent, and so much of the penalty as the charger would have declared upon her oath, that she had truly paid, which she refused, unless the whole penalty were paid, whereupon he consigned through her fault.

THE LORDS sustained the reason, and ordained the notary and witnesses to depone upon the truth of the instrument, for instructing thereof.

Fol. Dic. v. 2. p. 59. Stair, v. 1. p. 304.

No 51.

Found, that money consigned is not at the risk of the consigner, if he consign warrantably *sine culpa*.

1673. February 15.

MOWAT against LOCKHART.

MARCUS MOWAT having charged James Lockhart upon a decret arbitral containing many distinct articles, he did suspend, and consign L. 200 for the value of certain gilders, which by the decret arbitral was modified to 40s. the gilder, and he consigned 22s. for the gilder in the hands of Henry Hope, treasurer of the Court in *anno* 1658, and Henry having broken, the consigned:

money is lost; and in the discussing of the suspension, the question arose, Whether the consignation should be upon the peril of the consigner, or of the charger.

No 51.

Whereanent, the LORDS found that it was not upon the peril of the consigner if he consigned warrantably *sine culpa*; and found, that he being charged for the whole articles of the decreet arbitral, and that by the decreet discussing the suspension less was found due than he was charged for, that he was not *in culpa* to consign, albeit he had no reason of suspension against the article for which consignation was made, without necessity to him to have offered what was due as to that article before consignation; because having received one charge for the whole articles, upon six days, he neither should nor could seek the charger to offer the sums due by that article before consignation; and found, that albeit the gilder was now modified by the Lords to 30s., and that the charge was for 40s.; that the consignation of 22s. was not the consigner's fault, seeing it was the order of the Judges for the time who ordained 22s. to be consigned for the gilder, and caution for the rest.

Fol. Dic. v. 2. p. 60. Stair, v. 2. p. 173.

1675. July 9.

EARL of QUEENSBERRY against The DUKE of BUCCLEUCH.

THE Earl of Queensberry, as sheriff of Nithsdale, having charged the Duke of Buccleuch for the cess of his lands, imposed by the convention of estates *in anno* 1665; he suspended and consigned. The question arose, on whose charges the consigned sums should be lifted. Queensberry *alleged*, that he having charged but *ex officio* as Sheriff, ought not to be burdened. It was *answered*, That the party who was in the fault by suspending, should bear the burden; but Queensberry was in the fault, because he charged for more nor was due, as was now found by the event. It was *replied*, That Queensberry had charged for no more than the Duke's proportion, and therefore he ought to have offered what was due, and shown a discharge of what was paid, and upon refusal consigned, otherways he had not warrantably suspended, and therefore should bear the burden, in lifting the consigned sums,

Which the LORDS sustained.

Fol. Dic. v. 2. p. 60. Stair, v. 2. p. 343.

No 52.

Sums consigned in a suspension must be taken up and delivered on the suspender's expenses, if he has not warrantably suspended.

SECT. VII.

Between Landlord and Tenant.

No 53.

1612. June 13.

LINDSAY *against* HOME.

LANDS being set in tack and thereafter being destroyed by overblowing with sand, will furnish action to the tenant to compel the setter either to grant diminution of the duty, according to the deterioration of the land and proportion thereof, or else to take back his-own land, and free the tenant of payment of duty in all time coming.

Fol. Dic. v. 2. p. 60. Haddington, MS. No 2456.

No 54.

1662. June 24.

DAVID WILKIE *against* SIR ANDREW KER.

DAVID WILKIE and others, tacksmen of the customs, charged Sir Andrew Ker for the tack-duty of the customs of the border, *anno* 1650, set by them to him. He suspends, and alleges, by the public calamity of the English entry in *anno* 1650 in July traffick was hindered, and by the King's proclamation, against commerce with these. The charger *answered*, it was a casualty *ex natura rei*, and that they had paid without defalcation, and the suspender had profit in former years.

THE LORDS before answer, ordained the suspender to count upon what benefit he got in *anno* 1650, and what profit above the tack-duty in former years:

Stair, v. 1. p. 113.

1663. February 20.

BAILIES of EDINBURGH *against* HERITORS of EAST LOTHIAN and MERSE.

No 55.

Total devastation found to liberate from the tax of public maintenance.

THE bailies pursue these heritors for so much allowed of the maintainance of these shires, of the months of August and September 1650; and insisting on an act of litiscontestation in *anno* 1659, whereby the defenders having proponed a defence of total vastation, the same was found relevant. The defenders having now raised a review, *alleged* that they ought not to have been put to prove total vastation, seeing vastation was notour, these shires being the seat of the war, where the English army lay, which ought to have freed them, un-

less the pursuers had *replied*, that the heritors got rent that year, and had been 'burdened with the probation thereof. 2dly, The order of Sir John Smith's general commissary, and also of the provisors of the army, bearing the provisors to have furnished such provisions want witnesses, and might have been made up since they were out of their offices.

THE LORDS adhered to the act, and found the defence of total devastation yet relevant in this manner, that the heritors got no rent; and granted commission to receive witnesses, at the head burghs of the shires, for each particular heritor, to prove their particular devastations; and sustained the order of the general commissary, he making faith that he subscribed an order of the same tenor while he was in office.

Stair, v. I. p. 184.

1667. January 2.

FRANCIS HAMILTON against —.

FRANCIS HAMILTON having suspended a decreet, obtained against him for house-mails; on this reason, that his wife only took the tack, which could not oblige him; it was *answered*, that his wife keeping a public tavern, was evidently *præposita huic negotio*;

Which the LORDS sustained.

Another reason was, that the house became insufficient in the roof, and the defender, before the term, required the pursuer to repair the same, which he did not; and the neighbouring house, called, *The Tower of Babel*, falling upon the roof, made it ruinous. It was *answered*, That was an accident without the pursuer's fault, and the tenant ought to pursue those whose tenement it was that fell.

THE LORDS found the reason was not relevant to liberate from the mail, unless the suspender had abstained to possess; but found it relevant to abate the duties in so far as he was damnified.

Fol. Dic. v. 2. p. 60. Stair, v. I. p. 422.

1667. November 20. TACKSMEN of the Customs against GREENHEAD.

THE customs of the Borders being set in sub-tack to Greenhead and others, by the Tacksmen of the hail customs of the kingdom; Greenhead is pursued as representing his father, one of the sub-tacksmen, for the duty the year 1650. It was *alleged*, That the sub-tack was altogether unprofitable; upon the occasion of the English invasion; so that beasts and other goods were not im-

No 56.

The damage sustained by the tenant of a house, in consequence of the fall of a neighbouring house allowed out of his rent.

No 57.

Abatement was allowed to the tacksmen of the customs, in consequence of the invasion of an enemy.

No 57. ported, nor exported that year, as they had been in use formerly. It was answered, That albeit in *prædiis rusticis*, in case of sterility, vastation, and such other calamities that cannot be avoided, there may be abatement craved *et remissio canonis*; yet in this case the subject being *conductio rei periculosa et jactus retis*, the sub-tacksmen ought to have no abatement, and are in the same case as tacksmen of salmon fishing, who will be liable for the duty, albeit no profit arise to them.

THE LORDS found, that sub-tacksmen should have abatement; but the question being most *quatenus*, and concerning the proportion; because, though the sub-tacksmen had undoubtedly loss, yet it was not total; there being some commerce betwixt the kingdoms for that year, some months; it was found in end, upon hearing of parties, that the half of the duty should be abated.

The law is very clear, *D. Locati*, and the Doctors upon that title, not only in *prædiis* but in *conductione vestigalium*, and the like, in case of an insuperable calamity, *remittitur canon et merces*; but they are not so clear as to the *quatenus* and proportion of the abatement, when the detriment is not total; but it is just, the abatement should be proportionable to the loss; and accordingly the LORDS decided.

Act. Lockhart et Cuninghame.

Alt. Sinclair.

Clerk, Hay.

Fol. Dic. v. 2. p. 60. Dirleton, No 108. p. 45.

No 58.

The landlord of an upper-tenement unroofed it. The tenant of the under tenement, belonging to a different proprietor, was found entitled to abatement of his rent.

1681. December 15. JAMES DEANS against ALEXANDER ABERCROMBY.

JAMES DEANS having set the uppermost lodging save one of a tenement to a vintner, whereof a great part happened to be rendered useless to the tenant, by the heritor of the uppermost house his taking off the roof, and heightening his own house, which subjected the lower house to rains and other inconveniences, for four or five months during the building; the vintner, when pursued for the rent, craved allowance of the *lucrum cessans*, and whole damage he had through the change of the roof.

Answered; The said damages having happened without the landlord's fault, they must be imputed *casu fortuito*, to which the tenant is liable. 2do, The accident not having taken away the use and benefit of the whole house from the tenant, it is not in the case of *vastatio*, which by the common law makes the damage rest upon the landlord.

“ THE LORDS sustained the defence for the tenant, and ordained him to condescend on the damage, reserving the modification to themselves;” albeit in another case, incommoding the entry to a tavern in Wilkie's land, by the stone and rubbish of the next house that was demolished, was not sustained relevant to diminish the rent.

1688. *January*.—A VINTNER pursued for the rent of the second story of a tenement possessed by him as a tenant, claimed allowance in the rent for damage sustained through Sir James Cockburn, heritor of the two superior stories, his taking off the roof, which occasioned the rains to damnify his plenishing and his wines, and to spoil his change.

Answered for the pursuer; That any damage sustained by the defender was casual, and not by the pursuer's fault.

THE LORDS decerned for the whole rent without deduction, reserving the defender's damages *contra* Sir James as accords. And they were of opinion, that Sir James could not be liable, the reparations being useful to all the stories.

Thereafter it was *alleged*, That the locator consented to the reparations, in so far as he was present at the dean of guild's visitation, and did not reclaim. And it was *alleged* against Sir James, That his reparations were not usual, in respect he took off the roof and raised the walls, and made a good story more with a flat roof, which occasioned much rubbish, and laid the roof open for three or four months.

THE LORDS found both Mr Deans and Sir James liable for the damage, which they proportioned. See PROPERTY.

Fol. Dic. v. 2. p. 60. Harcarse, (TACKS and RENTALS.) No 948. p. 267.
& No 956. p. 269.

* * * P. Falconer reports this case :

1681. *December 15*.—MR JAMES DEANS having recovered decret before the dean of guild of Edinburgh against Alexander Abercrombie, for payment of his house-mail; there was suspension raised at Abercrombie's instance, upon this reason, That the dean of guild had committed iniquity, in so far as he had repelled the defence following, viz. That Sir James Cockburn being heritor of the tenement above the suspender's lodging, by warrant of the dean of guild, took off the roof off the house, and heightened the same, wherethrough the suspender's lodging was exposed to the stones and rubbish that fell down upon him the time of the building, and being a vintner, no person would sit in his rooms, whereby he was damnified through want of his change, and his wine spoiled. THE LORDS finding that the damage proceeding from the nature and quality of the inferior tenement, and that the heritor of the superior tenement was not bound to keep the tenement of the inferior tenement skaitless, therefore they sustained the reason of suspension.

P. Falconer, No 40. p. 4.

* * * This case is also reported by Sir P. Home :

1681. *December*.—JAMES DEANS having obtained a decret against Alexander Abercrombie vintner, before the bailies of Edinburgh, for a house-mail

No 58.

possest by him; Alexander Abercrombie did raise a summons upon this reason, That the bailies committed iniquity in repelling this defence; that albeit the charger having set the house to the suspender, he was obliged to maintain it wind and water tight, and to havemaintained him in possession; yet he suffered Sir James Cockburn, who was heritor of the upper story, to take off the roof and to heighten the same, whereby the suspender did sustain a considerable damage, by the loosing of the use of his rooms, and the spoiling of his wines through want of change, the suspender having only taken the house to keep a tavern; as also he sustained loss, by spoiling of his furniture by the rain and lime during the time of the building of the house, which lasted for several months; which damage, albeit it had been accidental and casual, yet being *sine dolo vel culpa conductoris*, he ought to have allowance thereof in the fore-end of his rent; for in such cases, law allows *remissionem mercedis*, at least in so far as the damage sustained will amount to. *Answered*, That the damage allowed, not being occasioned *culpa vel facto locatoris*, but being only causal, extrinsic and accidental, through the fact and deed of another person, who in law might heighten his own house and the charger could not have hindered him, the suspender can have no deduction of the rent upon that ground; and therefore, the bailies did most justly repel that defence, reserving action against Sir James Cockburn as accords; for albeit the common law allows deduction of the rent, in case the lands be laid waste by warfare or some extraordinary storm or other accident, by which the hail rent of the land perishes, or the greatest part thereof; but not in other small extrinsic accidents, especially such as follow the nature of the thing locate, for these are always to be understood, *periculo conductoris*, such as the reparation of the house, nam *modicam incommoditatem, quæ ex necessaria refectione accidit, ferre debet colonus*. Leg. 27. Digest. Locat., et Conduct. et æquo anno ferre debet modicum damnum, cum non auferatur lucrum immodicum, leg. 25. par. 6. Digest. eodem. And even in the case of fire, war, sterility, or the like accident, the law does not allow the remission of the rent, if, by the fertility of other years, the loss be made up, leg. 15. Digest. and leg. 8. Cod. eodem. And it is offered to be proven in this case, the defender has gained more by keeping of his change, than all the rent of the house. THE LORDS sustained the reason of suspension; and found, that the damage having proceeded from the natural quality of the inferior tenement, and that the heritor of the superior tenement was not liable for the same; therefore, found the charger as landlord liable to the suspender for the damage.

Fol. Dic. v. 2. p. 60. Sir P. Home, MS. v. 1. No. 31. p. 43.

*** This case is also reported by Fountainhall:

1681. December 16.—JAMES DEANS writer, his decret against Alexander Abercrombie vintner in Edinburgh, for his housemail, was this day, on Redfoord's report, turned into a libel; and Abercrombie ordained to condescend on

the damages he had sustained, through Sir James Cockburn's taking off the common roof to both houses; and 'tis like the LORDS inclined to give him a proportional abatement of his rent effeiring to the rooms he wanted, or at least which were incommodated to him, considering the space they were so; the law allowing *remissionem mercedis*, even for accidental damages, though existing *sine culpa vel dolo locatoris*.

No 58.

Fountainball, v. 1. p. 167.

1696.

CRAWFORD *against* HIS MAJESTY'S ADVOCATE.

A SUPERVENIENT law having diminished the tacks-mans profits, it was found that this did not irritate the tack, but only afforded ground to ask an abatement, though it was the King who let the tack.

No 59.

Fol. Dic. v. 2. p. 60.

*** This case is No 19. p. 7866. *voce* KING.

1699. June 16.

WILSON *against* DAVID MADER.

No 60.

In a lease of a coaliery, the coal ceasing, no rent was found due.

WILSON in Culross, as assignee by Balfour of Wester-Beath, charges David Mader in Inverkeithing, on a tack, whereby Beath did set to him all the coals and coal-seems within his lands for three years, and took him bound to keep no more but only four coalleries, and to pay L. 42 Scots for each, extending yearly to L. 160 of tack-duty. Mader suspends on this reason, that in the end of the second year of the tack, the coal, the subject set, totally failed, and notwithstanding all the pains and expense both of them were at, no more coal could be found in that ground, which being equivalent to a total vastation, sterility, or deficiency, there was neither law nor reason to compel him to pay the tack-duty, no more than if the coal had been swallowed by a chasm, or if a salmon fishing were set, and it should be found, that no salmon swimed within the bounds of that river set in tack: And Dirleton observes, on the 20th November 1667, Tacksmen of the customs of the Borders *contra* Ker, No 57. p. 10121, that abatement was due because of the devastation then happening by the English invasion in 1650; and lately, George M'Kenzie got an ease of the tack-duty of the excise, because of the dearth and the supervenient law. *Answered*, This was a bargain of hazard, where he took the coal *per aversionem* whether existing or not, and is like that which the law calls *jactus retis*; and therefore, the failing or non-existence of the coal cannot liberate him from the tack-duty, seeing he might have as much profit the two years it lasted, as may pay the whole three years duty. THE LORDS sustained the reason of suspension in this circumstantiate case, and found it not such a bargain of hazard as

No 61.

to subject him to the tack-duty, seeing he had not exceeded the number of coalliceries, and if he had put in any more, he was proportionally to have augmented the rent; so it appeared to be the meaning of parties, that the coal ceasing, the tack-duty should also fall; though in some bargains the party may be liable whatever be the event, and though he get nothing.

Fol. Dic. v. 2. p. 60. Fountainhall, v. 2. p. 52.

1709. July 1.

The ADMINISTRATORS and TREASURER of HERIOT'S Hospital, *against* JOHN ANGUS, Tacksman of the Canonmills.

No 62.

A tacksman of mills not allowed abatement of his rent in consideration of a supervening declarator of immunity in favour of several, who, at the letting of the tack, were thought to have been thirled to the mills, and were in use to grind all their grain there, in respect no more was let but the mills and multures thereto belonging.

IN a pursuit at the instance of the Administrators and Treasurer of the Hospital, against John Angus, for payment of his tack-duty of the Canonmills possessed by him as assignee to a tack thereof set by the pursuers to the deceased Margaret Murray his former wife;

Alleged for the defender; At the date of the tack, the inhabitants of the Canongate of Edinburgh, were in use to grind all their grains for baking and brewing at, and thought to have been thirled to the Canonmills; which thirlage was, since then, restricted in a process against them, to what tholes fire and water within the sucken, and is now utterly evaded by kilning and cobling in Leith and elsewhere; therefore, seeing the extent of the multure is exceedingly diminished, the defender ought to have a proportionable ease or abatement of the tack-duty, conform to law, L. 9. Pr. L. 15. § 1. D. Locati Conduct. Stair Instit. Lib. 1. Tit. 15. N. 1. in fin.

Answered for the pursuers; No more was set but the mills, and multures thereto belonging, and the defender has all the multures that belong to the said mills; and if he was disappointed of his expectation by the Lords' interlocutor, that being no deed of the pursuers, can be no ground for any abatement of the tack-duty. The citations out of the civil law and my Lord Stair's Institutions, meet not the case, for these concern only eviction or perishing of the subject set; whereas here, the mills and lands are still extant and entire, and the constituted thirlage continued according to what the Lords found justly to belong to the said mills, and the pursuers set only the multures belonging thereto; besides, the LORDS have frequently found, That accidental loss through sterility or the like, are no cause for an ease of the tack-duty, more than extraordinary increase would occasion an augmentation thereof; seeing the mutual hazards of loss and gain redound by the nature of the tack to the setter or tacksman.

THE LORDS repelled the defender's allegiance in respect of the answer, and found no abatement due.

Fol. Dic. v. 2. p. 60. Forbes, p. 337.

1741. June 5.

ANNUITANTS of the YORK BUILDINGS COMPANY *against* Mr WILLIAM ADAMS,
Tacksman of the Baronies of Cockenzie and Tranent.

MR ADAMS having taken a lease of some estates belonging to the said Company, on which there were several coal and salt-works, &c. being charged for payment of the rent, suspended on this ground, That he had suffered great damage by the hurricane, which happened on the night between the 13th and 14th of January 1739, and therefore ought to be allowed retention of as much of the rent as was necessary for repairing the subjects damaged.

Answered for the chargers, That though it may be true, that, by law, a tacksman is only tied to ordinary diligence, so that, when houses on a farm are destroyed by thunder, lightning, or innndations, which could not be foreseen, or if foreseen, could not be prevented, the loss must affect the proprietor, and not the tenants; yet, where paction to the contrary has intervened betwixt the setter and taker, transferring the hazard upon the tacksman, such pactions ought to be observed, especially as in such cases as now under consideration, where the question is not upon such extraordinary events of thunder, lightning, &c. occasioning the total destruction of the houses, but a partial damage done to the houses on the farm by storms of wind, frequently occurring in this climate, though not so frequently in the same degree; and which therefore were probably under view of parties-contractors at the time of entering into this lease; see l. 15. § 2. D. Loc. Cond. l. 78. § 3. D. De contra emp. But, in the present case, it is not left upon a presumption; for, by a clause in the tack, L. 150 Sterling is allowed by the Company to the suspender for putting the houses in repair, upon which account, he is not only bound to put them in good repair, but to leave them so at the expiry of the lease. And if, by the above clause, any hazard at all is understood to be undertaken by the suspender, to be sure, it must be that of winter-storms, as being that which naturally would occur to both parties; and if this holds true, it will seem difficult to define the degree and extent of the storms he is to undertake, and such as he left upon the hazard of the proprietor.

Replied, By the nature of this contract, the tack-duty is the equivalent for the use of the subject set in tack, and the setter, before he can exact the tack-duty, must procure the tacksman possession, and maintain him in it. *2do*, It cannot be controverted, that a tacksman should not be liable for such extraordinary damages as might be occasioned by the late unusual and extraordinary storm; see l. 28, C. De Locat. l. 15. § 2. D. De Loc. so that, it is plain, unless a tacksman did, in express terms, undertake to insure the subjects from all damages, by which they could be attacked, either in the ordinary way, or by whatever other extraordinary accident, then the rule of law must take place, that the loss and damage occasioned by those accidents must fall on the heri-

No 63.

A tacksman is not bound to repair damage occasioned by any extraordinary accident, though he oblige himself in the lease to put the houses in repair, and keep them so, and receive a sum certain on that account.

No 63.

tors. 3^{to}, From the clause in the tack, no such inference can be deduced, for this being a *bona fide* contract, must be constructed according to the usual meaning of parties; and as even in cases of ambiguity, the interpretation would go against the setter, in whose power it was *legem contractui dare*, it is plain, the tacksman's obligation can be no further extended than to such repairs as should become necessary, through the common and usual decay and waste of the materials; but surely, in no construction, can it be extended to comprehend an earthquake or hurricane, with the like of which, this climate never, or at least rarely, was ever affected.

THE LORDS found, that the tacksman ought to have allowance for the extraordinary damages sustained by the late hurricane, notwithstanding the allowance of a sum in the tack, for putting the houses in repair, and the obligation to keep them in repair during the currency of the tack; and allowed a conjunct proof as to the condition the houses were in when the tempest happened, and the extent of the damages. See TACK.

Fol. Dic. v. 4. p. 62. C. Home, No 168. p. 282.

1741. July 10.

CLERK against SIR JOHN BAIRD.

No 64.

A TACKSMAN of lands, whereon there was a little collection of houses, notwithstanding a clause in his tack obliging him to keep the houses in repair, was found not liable to repair the damage done by the hurricane, which happened on the 13th January 1739, as to such of the houses as were damaged to an extent exceeding the effect of storms in use to happen in this country; but as to such of the houses as were not damaged beyond what might be supposed to happen in an ordinary storm, he was found liable to repair.

Kilkerran, (PERICULUM.) No 1. p. 376.

1742. December 3.

EARL of EGLINTON, and his Curators, against The TENANTS of the Baronies of Kilmares, Robertson and Dreghorn.

No 65.

What damage
sufficient to
free tenants
from payment
of rent.

AN uncommon storm of hail having happened in the year 1733, in that corner of the shire of Ayr, where the above baronies lie, whereby great damage was done to the Tenants who possessed corn-farms, and the Earl's Curators not thinking it safe for them to give deduction of the rents without authority, they pursued the Tenants before the inferior court; and the Tenants, after proof led, brought the matter before the Lords by advocacy. At discussing whereof, it was found, "That no rent was due by such of the Tenants as had proved that they reaped no more than about the value of their seed and labour."

Kilkerran, (PERICULUM.) No 2. p. 376.

* * * C. Home reports this case :

No 65.

THE Earl pursued these Tenants for the rents of their possessions, crop 1733.

The defence was, That, there happened, in the month of June that year, an extraordinary storm of hail and rain, accompanied with thunder and lightening, which destroyed and laid waste almost their whole corns; that the calamity was general, though it fell with a particular violence on the defenders, in so much that scarce any of them reaped what was sufficient for defraying the expense of seed and labour; consequently, as there was no crop, the defenders could be liable in no rent. And a proof having been allowed, and led, the most of the defenders proved their defence. *Answered*, The whole of the proof was a circle of the several defenders deponing for one another; every man depones for his neighbour, and his neighbour for him. *2dly*, It was said not to be a settled point amongst the Doctors, whether even a total sterility for one year does afford the tenant, who has a lease for several years, any claim of deduction on account of the sterility of that particular year? And whether he ought not to compensate the loss of one year with the profit of another, seeing, in all such matters, there is an evident chance, which each party runs the risk of? But as the pursuer is sensible the defenders suffered, he is willing to give the same allowance the rest of the gentlemen of the county gave to their tenants, *scil.* a half year's rent.

Replied to the *first*, That all the witnesses were persons of entire credit, men of substance for persons of their degree, and possessing by tacks; that none had sworn to his own loss, and swearing to his neighbours, could be no proof as to him; so the proof for each must be taken by itself. And to the *second*, it was *answered*, That what the defenders had reaped would not defray the expenses of seed and labour; consequently there was no crop, as nothing is to be understood in law to be *in fructu*, until deduction of the charges of gathering and in-bringing the fruits. See l. 46. D. De usuris et fructibus. Voet § 25. tit. Locati. l. 25. § 6. eod. tit.

THE LORDS found no rent due by such of the defenders who proved, that they reaped no more than about the value of seed and labour.

G. Home, No 213. p. 354.

1751. June 13. JAMES STRACHAN *against* CHRISTIE and Others.

JAMES STRACHAN, tacksman of the lands of Fairnyflit and Largie, part of the forfeited estate of Marshall, under the York Buildings Company, took a baron decret against his tenants therein, for certain sums, as arrear of their rents for crop 1745 and subsequent.

No 66.

No abatement was allowed to tenants out of their rent for exactions extorted from them by the rebels in 1745.

No 66.

Suspended, for that the rebels, when in possession of the country where these lands lie, did uplift the cess due out thereof; as also did impose on the lands certain sums proportioned by their valuation, or instead thereof, did appoint a soldier to be furnished them out of the said valuation of land; which the tenants were obliged to pay; and indeed paid the same by the charger's order.

The tenants failed in proving the order.

Pleaded for the suspenders, If rebels or enemies shall take possession of an estate, and levy the rents thereof, the tenants ought not to be liable to pay them again to their master; and their taking the rents is not the same thing with taking an indefinite sum from the tenant; cess is payable by the heritor; and tenants paying it are entitled to deduct it out of their rents; so that the rebels taking the cess was in so far taking the rent: As also was their taking the levy-money, which was imposed by them to be raised out of the land.

Pleaded for the charger, Rebels are to be considered as robbers, not as fair enemies; and for what they take, the person from whom they take it must suffer; nor will their declared intention found him in relief; cess is due to the King; and the argument used for the tenants would avail the heritors to retain it from him, which is not allowed them; the levy-money was imposed upon the tenants, as it was to redeem them from personal service; it cannot be said either of these sums was imposed upon the charger, though the execution went against his tenants; as the rebels concussed him to renounce his factory or tack of these lands, and took them into their own possession.

"THE LORDS found no allowance was due to the suspenders."

Act. R. Craigie.

Alt. Lockhart.

Clerk, Justice.

Fol. Dic. v. 4. p. 62. D. Falconer, v. 2. No 208. p. 251.

No 67.

An episcopal non-jurant chapel having been demolished by the King's army during the rebellion 1745, the congregation, who held the house in lease, were found liable for the rent, *quia culpa precederat casum*, in not praying for the King.

1751. November 13. SINCLAIR against HUTCHISON.

THE treasurer of the Episcopal congregation in Elgin, for himself, and in name and for the behoof of the said congregation, became tacksman of the mason-lodge there in the year 1734, for the space of 5, 7, 9, or 11 years, in the option of the said congregation, commencing from April 1. 1734, at 100 merks of yearly tack-duty; and the house was to be delivered back at the expiration of the tack, whole and entire in lights, &c.

It happened that the King's army, in their march to Inverness, demolished this meeting-house, broke the glass and timber of the windows, and did otherways considerable damage to the house.

In the action brought in 1747, at the instance of Robert Sinclair the then master of the lodge, against Thomas Hutchison, then treasurer to the congregation, for three years' rent preceding April 1747, and thereafter during their possession, and for the damage done to the house; the following questions oc-

curred, *imo*, On whom the damage done to the house was to lie ; on the proprietor or the *colonus*. On the one hand, it was *casus fortuitus quem non præstat colonus* ; on the other hand, *culpa præcederat casum*, in not praying for the King and Royal Family.

But as that was not a *culpa*, naturally or justly productive of the *casus*, which was in itself an irregular action, and not a lawful consequence of not praying for the King, the Lords " found the defenders not liable for the damage."

The next question was, Whether they were to be liable for the rent for the year between April 1. 1746, and April 1. 1747 ? Former years the defenders did not controvert ; and longer they could not be bound, as in that year the process was raised, wherein the defenders pleaded not liable, which was a sufficient upgiving.

Upon the one hand it was said, that they should be liable for that year, as they had retained the keys, and not given up the possession till they did it in the process, as has been said, which was not commenced till some months after the year was begun.

On the other hand, a difficulty was suggested from the Bench, That as it was now found, that the landlord was to bear the damage, the tenant could not be liable for the rent, when the landlord had not repaired the house, till which was done, it was not habitable. But it being also observed from the Bench, that there had been no requisition to the landlord to repair, who had therefore reason to think that the congregation was to do it, and to retain the expense out of the rent, and which was said to apply to every case of a repair incumbent upon the landlord ; the Lords " found the defenders liable for the rent of the year between April 1746 and April 1747."

Fol. Dic. v. 4. p. 63. Kilkerran, (PERICULUM.) No 7. p. 381.

1762. July 16. FOSTER and DUNCAN against ADAMSON and WILLIAMSON.

In January 1755, Foster and Duncan let to Adamson and Williamson a salmon-fishing in the river Tay, opposite to Errol, on the north side of a shallow named the Guinea-bank, to endure for five years. The river there is broad ; but the current, being narrow, past at that time along the north side of the bank, the rest of the river being dead water. As one cannot fish with profit but in the current, the tacksmen made large profits the first two years, and were not losers the third ; but the fourth year the current changed, which frequently happens in that river, and instead of passing as formerly along the north side of the bank, it past along the south side, which was a part of the river set to other tacksmen ; by which means the fishing let to Adamson and Williamson became entirely unprofitable the remainder of their lease.

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No 67.

No 68.

What degree of sterility will relieve from the tack-duty.

No 68.

The granters of the tack having brought a process against the tacksmen for L. 36 Sterling, being the tack-duty for the two last years, the defence was, a total sterility by the change of the current as aforesaid; and a proof being admitted, the facts appeared to be what are above mentioned.

It is admitted for the pursuers, that the extinction of the subject must have the effect even at common law to put an end to a lease; because the lease having a special relation to a subject which is to be possessed for rent, it cannot subsist when there remains no subject that can be possessed; as for example, when land is swallowed up by the sea, or when a river totally changes its course, and never returns to its former channel. The case is different in sterility whether of land or of fishing; for there the subject remaining in existence, is still capable to be possessed by the lessee; and consequently the lease subsists and the rent is due, however unprofitable the possession may be. If therefore there be any relief in the case of sterility, it must be upon equitable considerations; and whatever may be thought with respect to a total sterility during the whole years of the lease, or during the remaining years after the lease is offered to be given up, the sterility here was temporary only; for, as the stream of the river Tay is extremely changeable, it might have returned to its former place in a month or in a day; and as the tacksmen adhered to the tack, and did not offer to surrender the possession, they certainly were in daily expectation that the current would take its former course. That such a temporary sterility cannot afford a defence in equity against payment of the rent, will appear from the following considerations; *1mo*, A lease puts the lessee in place of the landlord as to profit and loss; the profit is his without limitation, and so ought the loss: *Cujus commodum ejus debet esse incommodum* is a rule in equity that holds with the greatest force in a lease where the lessee draws all the profit, if it should be ten times his rent, and on the other hand can never lose more than his rent. *2do*, There can be no equity in sustaining the defence after the lease is at an end; for at that rate, the tenant has a fine game to play: If the sterility continue to the end of the lease, the tenant takes advantage of the equitable defence to get free of the rent; but if fruitfulness be restored, he takes advantage of the lease, and makes all the profit he can. The landlord by this means continues bound, while the tenant is free, which is repugnant to all the rules of equity as well as of common law. *3tio*, At any rate, the tenant cannot pick out one or other sterile year to get free of that year's rent; if he have any deduction in equity, it must be upon computing the whole years of the lease; for if he be a gainer upon the whole, which is the present case, he has no claim in equity for any deduction. It carried however to sustain the defence of sterility, and to assoilzie the defenders from the rent due for the last two years of the tack.

Though this judgment seems not better founded in equity than at common law, it was however easy to discern what moved the plurality. In a question betwixt a rich landlord and a poor tenant, the natural bias is in favour of the

latter: The subject in controversy may be a trifle to the landlord, and yet be the tenant's all. I urged this in Court, and put a case opposite to that under consideration. A widow woman, with a numerous family of children, has nothing to depend on but her liferent of a dwelling-house and of an extensive fruit orchard. These she leases to a man in opulent circumstances, for a rent of L. 15 for the house and L. 25 for the orchard, which he possesses with profit on the whole. The orchard happens to be barren the two last years of the lease, and he claims a deduction upon that account. No man would give this case against the widow. So much do extraneous circumstances influence the determinations of a Court, even where the Judges are not sensible of being influenced by them.

I am not certain but that some of the Judges considered this as a *rei interitus* to afford a defence at common law; a very great mistake, as a thing cannot be understood to be totally destroyed, where we have daily hopes of its being restored to its former condition.

Fol. Dic. v. 4. p. 62. Sel. Dec. No 199. p. 263.

1768. March 3.

HARDIE against BLACK.

A FIRE having broke out in a room of an upper floor, where the tenant had erected a comb-pot for dressing wool, and consumed the house, an action was brought by the proprietor for indemnification.

It appeared, that it was not unusual, however dangerous, to erect such furnaces, even in the upper floors of houses; but that certain precautions were generally used to prevent the fire from being communicated to the house, which had been neglected in this case. It also appeared, that the proprietor was in the knowledge of the use to which the room was applied, some time before the fire happened.

The defender *contended*, That it was not every degree, even of neglect, that would subject the person to damages, in whose house a fire broke out; and, in proof of that proposition, referred to *L. 2. De Incendio; L. 2. D. De peric. et commod. rei vend.*; *Voet. ad tit. Ad leg. Aquil. num. 20*. In England, there is a special statute, 6th Ann. ch. 30. which declares, that no action shall be competent for damages against any person in whose house, or chamber, a fire shall *accidentally* begin. In Scotland, there seemed to be no necessity for any such statute. No action was understood to lie, except in the case of wilful fire, as may fairly be concluded from this, that no action ever was attempted upon that medium, till the case of Sutherland *contra* Robertson, 14th December 1736, where the negligence of the tenant was exceedingly gross. See APPENDIX.

Answered, The defender was guilty of neglecting the precautions commonly used in such cases, for preventing the danger of fire; and must, therefore, be liable to make up the loss which has been sustained, in terms of the statute

No 68.

No 69.

A fire having broke out in an upper floor, where the tenant had erected a comb-pot to dress wool; the Lords found the tenant liable in the damage, because the usual precautions to prevent fire had not been taken.

No 69.

1426. c. 75. Various passages were also referred to from the civil law, particularly from the title *Ad legem Aquiliam*.

But it is unnecessary to be more particular. The principles upon which the decision proceeded are fully pointed out in the interlocutor.

THE LORDS found, That the comb-pot was erected in an improper manner, and that proper precautions had not been taken to prevent fire; and, therefore, found the defender liable in damages to the pursuer, and in expenses of process.

Reporter, Coalston.

Act. Armstrong.

Alt. Wight, Buchan-Hepburn.

G. F.

Fol. Dic. v. 4. p. 63. Fac. Col. No 65. p. 305.

No 70.

1778. July 3. FACTOR ON SHARP'S SUBJECTS *against* LORD MONBODDO.

ALTHOUGH the tenant is allowed an abatement of rent, where any part of the subject perishes by unforeseen accident; the LORDS found, That a tenant who had merely the use of a well, was not, on account of its failure, entitled to any deduction. See APPENDIX.

Fol. Dic. v. 4. p. 63.

1797. July 5.

ROBERT MACLELLAN *against* JOHN KERR and WILLIAM IRVINE.

No 71.

The lessee of a malt-kiln found liable in damages, where it was burned in consequence of his negligence.

JOHN KERR and William Irvine hired a malt-kiln from Robert Maclellan, at a guinea and a half, for three months; and obliged themselves to leave it in as good order as when they entered to it.

The upper part of the pot of the kiln, or place where the fire is put, was constructed of lath and plaster.

The kiln had not been used for some years; and on the second night of its being used by the lessees, their maltster left it at 12 o'clock, while there was malt, and a fire in the furnace. Next morning the kiln was discovered to be on fire, and was totally consumed, owing, it was supposed, to the lath having been kindled by the heat.

Maclellan brought an action of damages against Kerr and Irvine.

A proof was taken.

THE LORD ORDINARY found damages due, 'in respect it is proved, by the oath of Bryden, the manager, that he was informed part of the kiln was finished with lath and plaster; and on the night on which it was burned, he left it at 12 o'clock at night, without any other person to watch it.'

A petition against this interlocutor was followed with answers.

The pursuer founded both on the express obligation of the defenders to leave

the subject in good order ; Durnford's Reports, Bulloch against Dommit ;* and on their negligence in leaving a kiln, so constructed, at night, without a watch ; Vinnius' Inst. lib. 3. T. 25.

No 71.

The defenders maintained, that a tenant is in no case liable, where the subject is burned by accident ; and contended, that the fire, in the present case, was occasioned by the improper construction of the kiln, which, though known to their servant, was concealed from themselves ; and that it was not usual to watch kilns in the night time.

A considerable majority of the Court thought there was sufficient evidence of negligence on the part of the defenders to support the interlocutor ; and on that ground adhered.

Lord Ordinary, Swinton.
D. D.

Act. *Ja. Ferguson, jun.*

Alt. *Cha. Brown.*

Clerk, *Sinclair.*

Fac. Col. No 43. p. 101.

S E C T. VIII.

Whether a Creditor runs any hazard of the subject burdened with his debt.

1662. *June 26.* ADAMSON *against* LORD BALMERINO.

No 72.

A TENEMENT, out of which an annualrent was payable, being laid waste, several years deduction was sought by a singular successor in the tenement, of the annualrents of these years, as is frequently done in feu-duties.—*Answered*, Tho' in some cases feu-duties cease by devastation, this was never extended to annualrents due for the profit of a stock of money. The defence was repelled.

Fol. Dic. v. 2. p. 61. Stair.

* * This case is No 3. p. 3346, *voce* DEBTOR and CREDITOR.

1686. *January.* GEORGE MONTEITH *against* ANDERSON.

JOHN ANDERSON having right by progress to an infeftment of annualrent of L. 80 yearly out of a tenement of land in Edinburgh, pursues poinding of the

No 73.
Found, that
by act 10th,
Parl. 1551,

* The Reporters do not, in any case, vouch for the accuracy of references to authorities from the Law of England.

No 73.
an annual-
renter must
suffer a pro-
portional
abatement
when a tene-
ment is burnt.

ground.—*Alleged* for the said George Monteith, who had adjudged the tenements from William Anderson the heritor, That the tenement being burnt, and since re-built upon the heritor's expenses, the pursuer cannot poind the ground for his whole annualrent, but it must abide a proportional deduction with those having right to the property, conform to the 10th act of Parl. 4th Queen Mary, asent the annuals of burnt lands; and the town of Edinburgh, by an act of Council appointed annualrenters to be at a part of the expense of building.—*Answered*, That the ground on which the tenement was built was valued to the worth of 5000 merks, after the house was burnt, which was more than the pursuer had upon the land, and therefore ought to suffer no deduction; and the act of Parliament can only be understood to take place in case the ground be not worth so much as will pay the annualrent; and if the heritor has been at the expenses of re-building the tenement, he has the benefit of the meliorations, which will be more than the annualrent of his money that he has bestowed upon the building; whereas the pursuer, the annualrenter, gets no benefit by these meliorations; and however the act of the town Council of Edinburgh may regulate the order and method of building, for the profit and decorement of the burgh, yet that cannot prejudice parties' rights.—*Duplied*, That albeit the ground of the burnt tenement was valued to 5000 merks, that was only in order to re-building; but if it had not been re-built, it would not have yielded any annualrent; so that the pursuer would not have gotten payment of his annualrent; and the act of Parliament is express, that if the annualrenters would contribute and pay a part of the expenses, for the rate of the annual, that they shall have the hail annual after the bigging of the houses; so that if the annualrenter have not contributed any part of the expenses for re-building of the houses, he cannot have payment of his annualrent. And albeit the heritor, by the meliorations of the building, should get the annualrent of his money by the re-building, yet he being at a loss by the burning, and being at the charges of the re-building, the annualrenter ought to suffer a proportional loss, and bear a part of the expenses with the heritor, before he can get payment of his annualrent.—**THE LORDS** found, That by the act of Parliament the annualrenter might suffer a proportional deduction, in respect the tenement was burnt and re-built, and that the annualrenter did not contribute thereto; and repelled the defence, that the value of the waste ground was worth the annualrent; but found it relevant to sustain the hail annualrent, that the annualrenter offered to contribute with the heritor to the re-building, and was not admitted.

Fol. Dic. v. 2. p. 61. Sir P. Home, MS. No 771.

S E C T. IX.

Fiar and Liferenter.

1672. February 2.

Captain GUTHRIE *against* LAIRD of MACKERSTON and his BROTHER.

No 74.

A jointure-house being burnt *casu fortuito*, the Lords found the heir not liable to rebuild it.

CAPTAIN GUTHRIE having married the Lady Mackerston, pursues the Laird of Mackerston for his aliment, during the time that his mother entertained him, both before her marriage and after, as belonging to the husband *jure mariti*, and by a particular assignation, and also for the aliment of his brothers and sisters, whom he was obliged to aliment; and pursues; themselves likewise for their own aliment. The defender, Mackerston, *alleged*, That, for his own aliment, *non relevat*; because, his mother liferenting all the estate he had, she was obliged in law to aliment the heir, he having no other means; neither was he obliged to entertain his brothers and sisters, he having no means to entertain himself. And for the remanent children it was *alleged*, Absolvitur from their aliment, during their mother's viduity; *imo*, Because she was obliged, by the law of nature, to aliment her children, who had no other means; *2do*, Though they had had means, yet the law presumes that she entertains her children *ex pietate materna*, especially seeing she never made any agreement for their entertainment with themselves or their friends; *3tio*, As to the entertainment after her marriage, it being the continuance of the entertainment before her marriage, and her husband having declared nothing of his mind, it is presumed to have been *puro animo donandi*. The pursuer *answered*, That *pietas materna* takes only place where the children have no means; but if they have, the presumption ceaseth; and though no agreement was made thereanent, yet the LORDS ought to modify *secundum valorem*; and the third ground holds not at all *contra vitricum*; for then the mother being married, she had no power to exhaust her husband's means, by alimenting her children; but she only alimments, and is in the condition of any other stranger alimenting; *2do*, There supervened 1000 merks to some of the children by legacy; and as for the heir, he had a considerable estate unliferented, standing in trust in the Earl of Roxburgh's person, who is now denuded in favour of the heir. It was *answered*, That what the Earl of Roxburgh has disposed to Mackerston his oye is out of mere favour, and that there was no trust declared, nor was there any access thereto upon that ground the time of the alimenting.

THE LORDS found the defence and duply, proponed for the heir, relevant to liberate him; and as for the other children, they found, that so long as they

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were alimanted by their mother, without any agreement, that the same was presumed to be *ex pietate materna*, by free donation, if they had no considerable estate; and that the having of 1000 merks of stock, as to persons of that quality, did not take off the presumption: They found also, that the entertainment of any person being of discretion, after pupillarity, without any agreement or signification to the party to remove, or otherwise to be liable, did presume that the entertainment was freely gifted, and infers no obligation, whatever means the party entertained have; but found, that a stepfather or stranger entertaining persons within pupillarity, though without paction, or declaring their mind, were not presumed to gift, but that the party alimanted was liable *secundum valorem*.

The pursuer further insisted against Mackerston for the expenses of the melioration of the minister's manse, which the act of Parliament makes a real burden upon the heritor, and being paid by the liferenter, she hath in so far profited the heritor, and he ought to repay her. It was *answered*, That the burden of reparation of kirks and manses doth not affect the heritage or ground, neither is it *debitum fundi*; but doth only affect the heritor for the time, and no singular successor: *Ita est*, Mackerston was not then heritor, but the Earl of Roxburgh.

THE LORDS found the defence relevant, that the reparations was not *debita fundi*, affecting singular successors. The pursuer insisted, *3tio*, For the reparations of the Lady's jointure-house, which being burnt by accident in the Lady's widowity, was repaired by the husband. It was *answered*, That the heir not being obliged *pro casu fortuito* to repair the jointure-house, the reparations thereof are *inædificata solo alieno, quæ cedunt solo*, and are presumed to be gifted by him, who knew *solum esse alienum*. It was *answered*, That the law allows the expenses of the materials and workmanship, or at least power to demolish and dispose of the materials; *2do*, The general principle of law, *quod quisque tenetur in quantum lucratus est*, must necessarily take place, whether the repairer knew or knew not the ground to be another's.

THE LORDS found that the pursuer could not demolish or take away the thing that was *solo affixum*, nor crave any thing therefor, unless the house repaired be a house accustomed to be set to tenants for mail, and, in that case, found the heir only liable *in quantum lucratus est*.—See PERSONAL AND REAL.—PRESUMPTION.—RECOMPENCE.

Fol. Dic. v. 2. p. 61. Stair, v. 2. p. 57.

* * * Gosford reports this case.

In a pursuit at Guthrie's instance, as assignee by his wife, the Lady Mackerston, for alimenting three sons of her first marriage with the Laird of Mackerston, it was *alleged*, That the children having no visible estate of their own when their father died, the mother, without any paction with the child-

ren's tutors or friends, having al'imented them until her second marriage, and the pursuer, after he had married her, continuing likewise to aliment them, the law presumes that what the mother did was *ex pretate materna*; and Guthrie being *vitricus*, by marrying the mother, continuing likewise that they should remain in family, without craving any thing for their aliment; it was a tacit consent and homologation of the continuance of the mother's *pietas materna*; and so, during the mother's lifetime, nothing being craved, and her assignation to Guthrie being but a little before her death, and not being special as to any thing due for the children's aliment, he could have no action for the same. It was *replied*, That mothers-in-law not being obliged to entertain their children, but only their father, *ex linea paterna*, their voluntary doing thereof hinders them not to pursue for the same; and if it were otherwise sustained, it might take away the benevolence of mothers, and expose the children to starving; *2do*, Albeit a mother could seek nothing from children, when they had no means of their own, yet they getting a supervenient estate, albeit after the time of alimenting, they ought to be liable for the same; *3tio*, A second husband suffering the children to remain in family, he cannot be presumed to do it *ex pretate*, being a stranger.—THE LORDS did, notwithstanding, sustain the defence; and found, that, albeit children had means of their own, yet, where a mother does aliment them without any paction, she can crave nothing for it during her widowhood; neither can a second husband, who marries her, if he does not intimate to the friends or tutors, that he will put them out of the family, and make an agreement with them, or that he do so to the children themselves, after they come to the years of discretion, and that they had an estate at that time.

It being likewise libelled, That the mother had paid for her liferent lands to the Minister, for reparation of the manse; which being profitably done for the son, who was apparent heir, and is now infest, and in possession of the said estate of Mackerston; it was *alleged*, That he not being heritor for the time, but the Earl of Roxburgh, who then stood infest, he was only liable for the said reparation, which not being *debitum fundi*, could not affect the defender, who was a singular successor.—THE LORDS did sustain the defence, and found the expenses of reparation of manses not to be *debitum fundi*. *3tio*, It was libelled, That she had built a house on her liferent lands; and, therefore, that he ought to be refunded of the expenses, or have liberty to take away the materials. It was *alleged*, That there being a house there before, which was burnt during the liferenter's possession, albeit she had built a better house, the expenses were not due, seeing she had the benefit thereof during her lifetime, *et quicquid ædificatur in alterius solo, solo cedit*.—THE LORDS did sustain the defences; and found, that this house being *prædium urbanum*, and not in use to be let for mail and duty, whereby the fiar was not *locupletior factus*, the liferenter, or her assignee, could not crave back the expenses, nor any materials that were fixed work; but might take away that which was moveable and loose.

Gosford, MS. No 456. p. 337.

1682. *January 4.*RACHEL WILKIE *against* HENRY MORISON.

No 75.

A wife being infest in annuity out of a house, the Lords found the husband's heir liable to make it habitable, and personally liable for the annuity, till habitable.

In an action pursued by Rachel Wilkie against Mr Henry Morison, as representing her husband, Henry Morison, for fulfilling of her contract of marriage, *viz.* for employing of 20,000 merks for her liferent use; and also, in regard there was an obligation in the said contract, for infesting of her in an annualrent of 400 merks, to be uplifted out of several tenements belonging to her husband in Edinburgh, which tenements became ruinous, and were taken down by the defender, by order from the Dean of Guild, she did conclude, that Mr Henry, as heir to her husband, ought to be liable to her for the said yearly annualrent. And it being *alleged* for the defender, That he, as heir to her husband, could not be liable personally for payment of the annualrent, in regard there was no personal obligation for payment in the contract, but altogether personal obligation for infesting, and which was fulfilled, she being infest accordingly:—THE LORDS found, that this being a contract of marriage, which was *contractus maximæ bonæ fidei*, the husband was liable to make the tenement habitable; and, therefore, the tenement having become ruinous by time, they found the defender, as heir to the husband, was liable for the bygone annualrent, and in time coming, till the tenement was rebuilt, and made so that she might have tenants thereto.

Fol. Dic. v. 2. p. 61. P. Falconer, No 15. p. 7.

. Harcarse and Sir P. Home's reports of this case are No 36. p. 8274.
voce LIFERENTER.

1704. *December 15.*REBECCA ADAMSON *against* DEAN OF GUILD NICOLSON.

No 76.

A house, in the possession of a liferenter, was casually burnt. The Lords found the heritor liable to the liferenter in no more but the annualrent of the sum to which the price of the waste ground was liquidated, and at which he had sold it.

LORD TILlicOUNTRY reported Rebecca Adamson, relict of George Graham, merchant, against Dean of Guild Nicolson of Trabroun. The said Rebecca charges the Dean of Guild on a liferent-tack of a house at the entry to the Parliament Close, to put her in possession of the same. He suspends on this reason, that the charge is most unwarrantable, seeing the tack bears she was in possession at the very time of the setting, and so there was no clause warranting a summary charge; *2do*, Though it were turned to a libel, yet this house being burnt down by that dreadful fire on the 3d of February 1700, the Magistrates cognosced the value of the ground, and apprised his fee and property to four years purchase, at which rate he sold it; and so it being now rebuilt, he can be liable in no more but the annualrent of the price he got since the time he received it; for it being consumed *vi majeure*, without his fault, as the property ceased during its lying in rubbish, so must her usufruct, and all other

servitudes do, *ubi perit subjectum*. *Answered*, She only insists for repossession, being put from it by the fire; and as to the share she may acclaim, there is a notable rule laid down by the 10th act of Parliament, 1551, for rebuilding the burnt tenements in Edinburgh consumed by the English, after the victory obtained at Musselburgh, in the last article whereof it is provided, that liferenters of such burnt lands, now rebuilt, shall have right to a third of the rent which the house paid before the burning; and she subsumes, that her houses paid 500 merks yearly, and so the Dean of Guild must pay her the third of that mail ever since the rebuilding, and yearly in time coming; and this rule has been followed by subsequent Parliaments, as by act 58th, 1573; act 226th, 1594; and act 6th, 1663. *Replied*, The act 1551 was but a temporary regulation, and concerns ground-annuals due to chaplains, and other kirkmen, by mortifications; and though Mr William Clark's waste land at the Cross, and some others, were valued higher, at six or seven years purchase, yet he could get no more but four years, and is willing to give his oath there was neither collusion nor concealment, and he always offered her the annualrent of that sum.—THE LORDS found the charge unwarrantable; but, in respect of the suspender's consent, they sustained it as a libel; and found him liable in no more but the annualrent of the four years purchase, to which the price of the waste ground was liquidated, and for which they decerned during the liferenter's lifetime. The Dean of Guild's son, and Thomas Boys, writer, being cautioners in the suspension for him, they applied to the Lords by a bill, and represented, that the charge being found unwarrantable, and only turned to a libel, of consent, otherwise she behoved to have raised a new pursuit, they were, by the law and practiques of the nation, liberated of their cautionry; and, therefore, craved up their bond.—THE LORDS found them free, and this conform to prior decisions, cited by Stair, in his Institutions, Lib. 1. Tit. 17.

Fol. Dic. v. 2. p. 61. Fountainhall, v. 2. p. 247.

S E C T. X.

Hazard of the rising or falling of Money.

1540. May 12.

Mr JAMES FOULIS *against* JAMES CRAIG.

GIF ony landis be annalzeit under reversioun, contenand ane certane sowme of gold and silver, he to quhom the reversioun is maid may redeme the landis,

No 77.

payand or consignand any peice of gold, and the rest in silver, or any peice in silver, the rest in gold; for it is not necessary in this cais to give ane half of the sowme in gold, and the uther half in silver, or zit that the gold or silver quhilk he payis or consignis be pure, and without commixtioun of any uther metall; bot it is sufficient to pay sic silver and gold as has commoun course within the countrey for the time. And gif the value of the gold and silver contenit in the reversioun be mair and greiter at the time of the redemptionn than it was at the time of the alienatioun, the excrescence and superplus thair-
of *cedit lucro venditoris*.

Fol. Dic. v. 2. p. 61. Balfour, (REVERSIOUNIS.) No 11. p. 455.

No 78.

1731. February 6.

HAMILTON against CORBET.

THE value imposed upon money, by public authority, is the only thing considered in payments, and not the metal of which it is made; at the same time, it is not at the time of contracting the debt that the value of the money is to be considered, but the time of payment; and, therefore, when the value of the coin is augmented or diminished, the profit or loss is the debtor's and not the creditor's.—*See APPENDIX.*

Fol. Dic. v. 2. p. 62.

S E C T. XI.

Teind where the Stock is destroyed.—Multure where the Ground
is destroyed.

1549. January 20.

ABBOT of HOLYROODHOUSE against The LAIRD of INVERLEITH.

No 79.

(A PERSON not to be compelled to pay teind.)

GIF the landis wer lyand waist be the deceis of his tenentis labouraris thair-
of, quha wes ather slane be the enemie, or deceist be the pestilence; or gif
ony multitude or armie, not beand enemeis bot confederatis of this realme, or
of our Soverane Ladyis awin liegis, eates, be oppin force and violence, cornis,
or destroyis, reivis and takis away the samin cornis.

Fol. Dic. v. 2. p. 62. Balfour, (TEINDIS OF BENEFFICES.) No 8. p. 146.

1549. December 19.

ABBOT of HOLYROODHOUSE *against* Mr JOHN MONTPENNY.

No 80.

GIF ony persoun be debt-bund, or oblist to ane uther for payment of his teindis, he sall not be compellit to pay the samin, or ony part thair of, gif the cornis that grew upon the ground wer destroyit, waistit or consumit be force or violence; to the quhilk he wes not hable to resist, being ane host, armie or multitude of men.

Fol. Dic. v. 2. p. 62. Balfour, (TEINDIS OF BENEFICIS.) No 8. p. 146.

1563. July 29.

The CHAPTER of GLASGOW *against* The LAIRD of CRESSFORD.

No 81.

WEIR standand betwixt this realme and Ingland, and the cornis of the bouris beand schorne and stoukit, and the awneris thair of dar not leid nor put the samin in the barn zaird, for fear of burning thair of by the enemeis, gif the samin perish and rot for the maist part upon the fieldis, the tenentis awneris sould not be compellit to pay teind for the samin.

Fol. Dic. v. 2. p. 62. Balfour, (TEINDIS OF BENEFICIS.) No 7. p. 146.

1702. December 9.

JAMES AITKEN & ROBERT MAXWELL *against* The TENANTS of HALYWOOD.

No 82.

JAMES AITKEN and Robert Maxwell, the Earl of Nithsdale's millers at his mill of Clouden, pursue the Tenants of the Carse of Halywood for their bygone abstracted multures. *Alleged*, The lands out of which this multure was acclaimed were of old 26 acres; but now, by the overflowing of the water of Nith, they are so drowned and inundated, that there are near 13 or 14 acres turned to a sand-bed, and become a part of the channel of the river *per alluvionem*, and so wholly lost and useless to the heritors; and as this would be a sufficient ground for a tenant to seek deduction and abatement of his rent, so it is as good a defence against mill-multures. *Answered*, The duty acclaimed is not so much the hire of service as a dry multure, which is due, whatever become of the land; for when it was lee and in grass, the multure was never denied, though it bore no corn nor multure-grain; and whatever might be pleaded, if there was an *interitus totalis* of the subject out of which the multure is payable, yet a partial sterility can afford no defence, else this might be obtruded against the feu-duty, or an infestment of annualrent; for, as long as there remains as much of the subject as will pay these, they remain still due: And

- No 82. if these acres had never been so much improved and meliorated, yet the quantity of the multure would not have been augmented, but continued still the same; so *quem sequitur commodum, eundem debet sequi et onus*. And here a partial loss can infer no diminution of the multure, seeing the acres remaining will do much more than pay the same, and the river may return to its former channel, and so the ground will be recovered again.—THE LORDS thought, if it had been only an acre or two overflown, it would not have deserved any consideration; but being an *interitus rei* to the half of the whole subject, they, before answer, allowed a probation for taking trial, what was the quantity of the loss and damage.

Fol. Dic. v. 2. p. 62. Fountainball, v. 2. p. 164.

SECT. XII.

Where a Builder upholds his Work.—PERICULUM between Master and Servant.

1775. August 1.

GEORGE CLERK and GEORGE IRVINE, Esqrs. against ALEXANDER LAWRIE.

No 83.

Periculum found to lie on the undertaker, bound by contract to uphold a bridge for seven years, which had fallen in the fifth year.

IN the year 1761, the Gentlemen of Lanarkshire came to a resolution of building a bridge over the Clyde, near Elwanfoot. Mr Clerk and Mr Irvine, the chargers in this action, were empowered to enter into agreements for building that bridge, and to receive the proposals of tradesmen. Upon this occasion, Alexander Lawrie, mason, presented a plan and estimate of the bridge, and was preferred to the other workmen, who had, at the same time, given in their proposals.

Matters, however, lay over for some years, when, in December 1766, a contract, agreeable to the estimate 1761, was executed between the chargers and Lawrie; in consequence of which, he proceeded to build the bridge, and completed it within a reasonable time. However, in November 1772, the bridge fell down, when it had only stood for five years; and, as seven years was the time stipulated for the undertaker to uphold it, application was made to him by the chargers to rebuild the bridge, at his own expenses, as soon as convenient. But finding him reluctant, a charge was given him for that purpose, which he brought under suspension; and a proof having been led, and a visi-

tation of the foundation of the bridge made by authority of the Lord Ordinary, the case was taken to report.

The reason of suspension was, that the suspender had implemented the contract on his part; and having implemented it, the chargers have no further claim against him; for though it is true, that, by the contract, he became bound to maintain and uphold the bridge for the space of seven years after it should be finished and found sufficient, and, in fact, it was destroyed at the end of five years, yet that accident is nowise imputable to him; for, being the effect of an uncommon speat, which it was impossible to resist or secure against, it can be viewed in no other light than if the bridge had been demolished by lightening, or thrown down by an earthquake; in either of which cases, the suspender would not have been liable, as he had done every thing in his power to implement his contract, and the work had been destroyed by an accident, which neither human power nor human prudence could provide against.

As to the obligation in the contract, founded on by the chargers, *argued*, All such obligations are to be interpreted according to the ideas suggested by right reason; and no law whatever will push their force the length of absolute absurdity. They will never be construed into an obligation to resist all powers, human and divine. If the work should be destroyed by the devastations of an enemy, no law will oblige the builder to restore it, far less will it oblige him to warrant it against the strokes of Providence, excited through the extraordinary efforts of nature, whether in the way of earthquake, of lightening, or of extraordinary and preternatural floods. In short, every extraordinary event that, in the common course of human affairs, could not be expected, is considered as barred in all contracts of this nature; for, as human prudence could not foresee them, it cannot be expected, from human care, that they should be particularly enumerated so as to be barred.

Answered on the part of the chargers; That the river rose higher, when the bridge fell, than what the suspender alleges he had been informed, can be no defence to him; because the bridge should have been sufficient to resist the flood, and he should have planned it so as to have made some allowance for accidents. But allowing the fullest force to the suspender's evidence, it appears in the proof, that the flood rose but a few inches higher than those floods, according to which the suspender pretends to have formed his plan; and that the suspender likewise acknowledged, that, if the foundations had not given way, the strength of the flood was not sufficient to have done any damage to the bridge.

High floods cannot be considered as extraordinary and unforeseen, as accidents of thunder or earthquakes; because, in building a bridge, a great allowance should be made for accidental floods, which may happen to be higher than any of which information can be got before the bridge is built.

The suspender might have some shadow of equity in his case, had the flood which happened when the bridge fell, brought down any extraordinary quanti-

No 83. ty of wood or ice along with it. But there is but little wood in that country growing above the bridge; and when it fell, there was no ice nor snow upon the ground.

Again, clauses, such as that upon which the suspender is charged, are necessary in all contracts of the nature of that under determination. Buildings may be constructed in such manner as to appear externally sufficient, whilst, at the same time, there are concealed defects of the most important nature.

In buildings, their standing or falling must be considered as the only criterion of the sufficiency or insufficiency of the work. When, therefore, the chargers received the bridge from the suspender, as a sufficient bridge, they did not receive it as intrinsically sufficient, but as apparently so only. They could find no fault with the external appearance of it; but the sufficiency of the work was to be determined only by its standing in good repair for seven years, the time stipulated in the contract.

Two witnesses only pretend to give any conjectural measurement of the height of the flood. The first witness says, that the flood, when the bridge was destroyed, rose about nine inches higher than a great flood he had observed about twelve years ago. The other witness says, that it rose nine or ten inches higher than what he had seen it; and these are the only witnesses who pretend to give any idea of the perpendicular rise of the flood.

There is not the smallest evidence that the fall of the bridge was owing to the force or pressure of the water. The true cause of its fall was the improper manner of laying the foundation of its pillars, which is evident from the gradual manner in which it was wasted by the floods, and the situation in which its foundations were when it fell.

Floods are the natural cause of the damage of every bridge, and must always be supposed to be circumstances particularly guarded against. Besides, the price which is to be paid for building depends very much upon the insurance to uphold it, and the length of the time specified. By such an insurance as the one in the contract, the suspender is certainly bound to insure against all accidents and misfortunes natural to bridges. In the case of a question about recovering insurance, would it be any defence to the insurers, that the fire had been communicated in an uncommon or extraordinary manner? or that the storm, which destroyed the ship at sea, had been the greatest known for many years? These are the natural misfortunes which the insurers against fire, or sea hazard, are bound to make up to the losers. By the same rule, floods are accidents natural to bridges, and which cannot excuse the workman from rebuilding, who contracts in this manner, and upon these conditions receives a certain price.

The Court were clear, upon the general principles, to give judgment against the suspender, in consequence of his obligation to uphold the bridge for the

number of years therein stipulated; and likewise seemed convinced, by the proof, that the foundation of the bridge was originally faulty.

THE LORDS repelled the reasons of suspension.

Reporter, *Auchinleck.*

Act. Geo. Clerk.

Alt. *Crosbie.*

Clerk, *Tait.*

Fol. Dic. v. 4. p. 61. Fac. Col. No 191. p. 121.

1794. November 29.

DAVID WHITE against DAVID BAILLIE.

DAVID BAILLIE, a farmer in the county of Forfar, having hired David White, as his servant, for a year, the latter, after entering into his service, was seized with an illness, which prevented him from working during 11 weeks. No other servant, however, was hired to do his work during his absence.

White having afterwards brought an action against Baillie, for payment of his wages, the defender claimed a deduction, in proportion to the period of the pursuer's absence.

The Sheriff gave judgment in favour of the pursuer.

A bill of suspension having been passed, the suspender offered to prove, that it was the practice of the county where he lived, to make such deduction; and farther

Pleaded, As in the contract of location, the premium paid by the conductor is meant to be proportioned to the benefit received by him, it is reasonable, that when any unforeseen accident deprives him of the expected advantage, he should be allowed an equivalent abatement. This principle is recognised where the subject of the contract is a farm or a house; (*vide supra, b. t.*) and it should hold more particularly in the contract between master and servant, as there the amount of the deduction can be more easily ascertained; and although, from motives of humanity to the latter, every short period of absence would not be taken into account, yet where the inability to work has been so long continued as in the present case, the defence ought to be sustained. Accordingly, at an appeal heard at the Perth circuit, within these few years, it was found, that a master was entitled to make a deduction where the servant had been absent on account of sickness a quarter of an year.

Answered, Wherever a person pays a determinate premium for the use of a subject, he takes on himself the risk of the quantity of benefit to be received from it. Upon this principle, in the case of a farm, although the tenant is not obliged to pay any rent, where, from circumstances not imputable to him, no crop at all is produced, he has no claim for abatement, merely because the farm has been less productive than usual. The same should hold still more in questions between master and servant, as the duty of the latter consists not so much in performing any specific quantity of work, as in a general respect and

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No 83.

No 84.

A farmer found not entitled to deduct any part of the wages of a servant hired for a year, on account of his having been disabled by sickness from working during eleven weeks of that period.

No 84.

submission to the former, and attention to his interest; which lay him under a corresponding obligation to take care of his servant, when in bad health; Stair, b. 1. tit. 15. § 1. 2.; Bankton, b. 1. tit. 20. § 19.; Erskine, b. 3. tit. 3. § 16.; see also, l. 38. *D. Loc. Cond.*

THE LORD ORDINARY found the letters orderly proceeded.

Upon advising a reclaiming petition, with answers, one Judge doubted the propriety of the interlocutor, and others wished to have the practice and understanding of farmers ascertained; but it was the prevailing opinion of the Court, that, without laying down any general rule on the subject, the circumstances of the case sufficiently warranted the interlocutor which had been pronounced. In England, (it was believed,) no abatement would be allowed in a case like the present; and it was thought a strong circumstance, that the suspender did not find it necessary to hire another servant in the charger's place, during his illness.

THE LORDS "adhered."

Lord Ordinary, *Dreghorn.*

Alt. *Robertson Scott.*

For the Suspenders, *Jo. Millar, jun. Monypenny.*
Clerk, *Home.*

D. D.

Fol. Dic. v. 4. p. 58. Fac. Col. No 135. p. 300.

Periculum in Contract of Insurance;—see **INSURANCE.**

See *Nautæ, Caupones, Stabularii.*

See **APPENDIX.**

APPENDIX.

PART I.

PERICULUM.

1806. May 27. ROSS'S ASSIGNEES *against* GALLOWAY and OTHERS.

MESSRS LANCE, MILBURN and Company, insurance-brokers in Liverpool, received an order from Messrs William and Henry Ross, merchants there, to effect insurance to the amount of L. 1600, on the ship *Meliora* for Virginia. Being unable to do this at Liverpool, they, according to the practice on such occasions, handed the order to William Galloway, insurance-broker in Edinburgh, to make the insurance.

This was accordingly effected by Galloway, in the capacity of sub-broker, who corresponded with his employers, Lance, Milburn and Company, and entered the transaction in his books to their account; and retained the policy of insurance for the purpose of settling any loss that might arise.

The *Meliora* sailed of this date, (13th February 1801;) but having never afterward been heard of, was considered as a missing ship.

The underwriters on this vessel who resided in England, settled the loss as total about the middle of September.

Messrs William and Henry Ross became bankrupt in the month of October, at which time they stood considerably indebted to Lance, Milburn and Company.

Of this date, (11th December 1801), the necessary documents for settling the loss were transmitted to Galloway by Lance, Milburn and Company, which was accordingly done, (19th December 1801), by carrying to the credit of their account L. 1173, 14 s., and handing them a credit-note to that amount. At this time Lance, Milburn and Company were indebted.

NO. 1.

Where a broker commits the charge of effecting an insurance to a sub-broker, who retains the policy in his hands, he must remit the money he recovers, in the event of a loss, to the broker, who will be entitled to the same preference over it as if he had effected the insurance himself.

NO. 1. to Galloway in an amount greater than the sum thus placed to their credit. During all this time, Galloway and the Messrs Ross never had any correspondence together.

Joseph Leay, assignee under Ross's commission of bankruptcy, brought an action against Galloway, and the underwriters employed by him, for the loss on the policy, The Judge-Admiral (17th December 1802), "repelled the defences." A bill of advocacy was presented and passed.

The cause was taken to report by the Lord Ordinary, when the Court (28th November 1804), advocated the same, and decerned against the defenders.

Upon advising a reclaiming petition, with answers, (26th November 1805), the Court "recall and alter the interlocutor complained of, sustain the reasons of advocacy, advocate the cause, assoilzie the defenders, and decern."

The pursuer reclaimed, and

Pleaded: An insurance-broker, although not a public officer, undertakes an office, in its nature public, having known and important duties attached to it, and in the execution of which obligations are incurred by him both to the assured and the insurers. The broker's general obligation, to the assured, is the faithful execution of this contract of mandate; to the underwriters he becomes bound in the payment of the premium. It is the broker who effects the insurance who is thus bound to the underwriters, and not any other broker who may have employed him: It is impossible that he can stand in a different relation to the insured; for it is quite inconsistent with the nature of the contract, that as to the one he should be broker, but as to the other, merely the agent of some other person, whose name does not appear in the policy, but who comes between him and the assured. The amount of each underwriter's subscription, in the event of a loss, is a debt directly due by them to the assured, and not to the broker; so that when the broker recovers a loss, he recovers it as the agent of the assured, to whom he is bound to remit the amount directly; and he ought not to attempt to create a preference in favour of any one else, by transmitting the money through the medium of another.

Answered: The right of a broker to retain a policy in security of debts due to him by the assured, where a loss is to be recovered, is such, that he is entitled to recover upon it whatever may be due, and without any authority or consent from the assured. If there be no loss, he may recover the premium from the assured, without any other warrant than the custody of the policy; and if there be a loss exceeding the premium, he stands between the assured and the underwriter, recovers the balance from the latter, and may apply it in payment of any debt due to him by the assured; Park on Insurance, p. 402. Now, the broker employed by the insured, although he may have

committed the charge of effecting the insurance to another person, and suf- NO. 1.
fered him to retain the policy in his custody, did nothing to divest himself
of the right of retention as a broker; the person by whom the insurance was
effected acted as the agent or clerk of the broker; he was accountable sole-
ly to his employer; had no communication with the assured; and makes no
claim whatever against them, in virtue of this policy. He and his employer
are not both claiming an hypothec over it; for he claims nothing; it is only
the broker who received the directions of the assured, and whose rights can-
not differ from what they would have been, had he effected the insurance
himself. The policy is held by the person he employed for his behoof; and
it must give the broker all the rights which would have attached upon his
own actual custody of it.

Upon this case, during all its different stages, the Court were much divid-
ed. But they finally adhered.

Lord Ordinary, *Polkummet.*

Act. *Corbet.*

Agent, *Ja. Gilchrist, W. S.*

Alt. Solicitor-General *Blair, Cathcart.*

Agent, *Alex. Kidd.*

Clerk, *Mackenzie.*

F.

Fac. Coll. No. 249. p. 558.

PERSONA STANDI.

1558. *April 1.* The KING *against* JOHN LINDSAY of Covington.

No 1.

THE persounis of inquest committis ignorant errour, retourand and deliver and the persewar to be narrest and lauchful air, conform to the clame, gif in veritie, the time of the service of the breve, our soverane Lord's letteris wer judiciallie productit, and schawin to thame, beand dewlie execute and indorsate, quhairby the persewar was denuncit rebel, and put to the horn, and as zit not relaxit thairfra; because he beand at the horn, and swa civille deid, had na persoun to stand in judgment, nor zit to ask or desyre to be servit air to his father, or to ony utheris his predecessouris.

Fol. Dic. v. 2. p. 85. Balfour, (OF BREVIS.) No 48. p. 429.

1563. *February 11.* JOHNSTON *against* LAIRD of JOHNSTON.

No 2.

Gif ony persoun havand ane lauchful wife be callit and persewit in ony action or cause, as for reductioun of his infementis, he hes na persoun to defend or stand in judgment be himself, or his procuratouris, gif he be denuncit our soverane Lordis rebel, and put to his horne, and not relaxit thairfra; and mair over his wife, albeit scho have special interes in the cause, as gif scho be conjunct fear of the saidis laudis, nather be herself, nor be hir procuratour, sould be admittit to defend in the mater; because scho havand ane husband, zit naturallie livand, may not stand in judgment, except scho be autorizit be him, quhilk he cannot do be ressoun of the said horning.

Fol. Dic. v. 2. p. 85. Balfour, (OF THE DEFENDER.) No 2. p. 294.

56 L 2

No 3.

1582. November.

HOME against HOMES.

An advoca-
tion being
produced for
a party be-
fore the in-
ferior court,
and the other
party offering
to debar him
from produ-
cing by a re-
gistered horn-
ing, and the
judge there-
upon giving
sentence
without re-
gard to the
advocation,
the Lords re-
duced the
sentence as
given *spreto*
mandato.

JAMES, DAVID, and ANDREW HOMES, brothers of the house of Lochtillo, were pursued by Alexander Home of Prendergaist before the Sheriff of Langtoun, to flit and remove from certain lands; in the meantime, and before the giving of the said decret into the said action, the said brothers produced before the Judge, letters direct from the Lords of Session, to hear and see the matter advocated, *et interea* to discharge the said Sheriff and his deputes from all further proceeding. The Sheriff, nevertheless, proceeded, and gave decret *condemnator*; *igitur dicti fratres* meant them again to the Lords of Session, and desired *absque ordinaria via reductionis* to be reponed again *tanquam a decreto a non suo iudice lato*. It was *answered*, That the Sheriff did no wrong in giving of the said decret *non obstan.* of the said discharge which was intimated to him, and he sufficiently certiorate of the same, because the said brothers, at whose instance the letters of advocation, with the discharge therein contained, were all the King's rebels, and at the horn for a slaughter, as the letters of horning bear, which were produced before the Sheriff, and so the brothers had no place to stand in judgment, and merited no benefit of the law. To the which it was *answered*, That albeit the party was rebel, and had no place to stand in judgment, yet not the less the Lords ought to have been obeyed, and the letters that proceeded from them; and in so far as the Sheriff did proceed and give process, being discharged by the Lords, he did wrong. The matter, with great contentation, being reasoned among the Lords, some were of the opinion, that albeit the party was at the horn, yet he might have sought advocation, as a party being at the horn may force suspension and relaxation; others were of the contrary opinion, that in so far as the said brothers were the King's rebels, and for a capital crime of slaughter, that neither the Lords, nor yet the Sheriff, or any inferior judge, could have shewn to them any favour, and that they had no place to stand in judgment, and were not capable of any benefit of the law, *quia fuerunt infami de jure et de facto, et sic non habuerunt personam in iudicio standi prout in L. 6. D. De iis qui notantur infamia*. The Lords pronounced, by interlocutor, that the Sheriff had done wrong, in so far as he obeyed not the Lords' letters, and that process should have been given to the parties, albeit they were at the horn in this case, and so ordained the said brothers to be reponed again into their own place, notwithstanding of the decret given by the Sheriff, because, after he was discharged, it was *tanquam decretum a non suo iudice latum*. *Bona pars dominorum in contraria fuerunt opinione*.

Fol. Dic. v. 2. p. 85. Colvil, MS. p. 340.

. A similar decision was pronounced, 8th March 1634, Charteris against Myles, No 6. p. 368, *voce* ADVOCATION.

1590. ———.

WEDDERBURN against ———.

No 4.

A HORNING not proceeding upon the LORDS' letters, but only upon a written command given to the party by the King, charging him not to intromit with certain teinds under the pain of rebellion, whereupon the disobeying was denounced; the LORDS refused to sussain it to debar the party *ab agendo*.

Fol. Dic. v. 2. p. 84. Spottiswood.

*** This case is No 2. p. 5731, *voce* HORNING.

1609. November 11.

THOMSON against RAMSAY.

IN an action betwixt Thomson and Ramsay, for annulling a horning, it was *alleged*, That the pursuer should have no process, because he was rebel unrelaxed. He *answered*, That he might stand in judgment notwithstanding this horning, because his summons was for annulling thereof. THE LORDS found, that because the event of the plea was uncertain, that he should suspend and relax himself, because the defender would be greatly prejudged if he should have process, and make no surety for his satisfaction, in case he failed in his reduction; but they resolved if the cause of the horning was so great as the pursuer was not able to find caution, that they would grant suspension and relaxation *super juratoria cautione*.

No 5.

A person debarred by horning might proceed in his defence on finding caution, and if he could find no other, juratory caution.

November 18.—IN an action of annulling, and improbation of a horning, between Thomson and Ramsay, wherein Hew Maxwell had interest, the party denouncer, donatar to the rebel's escheat, the treasurer, advocate, and all other parties having interest being called, it was *alleged* by the pursuer, that the horning called for should be decerned to make no faith, because it was not produced. The donatar compearing, and defending, *answered*, that no such certification could be granted, because he had produced the extract lawfully subscribed, which satisfied the production, seeing it contained the tenor of the letters, and of the executions. The pursuer *replied*, That the extract was not the principal, and could not subsist without the warrant of the principal letters and executions thereof, which not being produced, the extract could make no faith, especially seeing the donatar had done no diligence against the denouncer for production of the principal letters, seeing he was called to that effect by the pursuer in this same summons; and albeit the said donouncer would not compear and produce, that could not hurt the donatar, who had the King's right and place; and if hornings were decerned to make no faith for not production of the principal letters, the King should never get an escheat, because

No 5.

the party denounced and registered, agreeing with the denouncer, and satisfying him, should get the principal letters in his hands, and destroy them, and so defraud the King of his casualty; whereas upon the other part, if the extract should be registered to satisfy the production, the verity of the executions might be tried by the officer and witnesses therein contained; likeas, in this case, the collusion was manifest in respect of the collusion betwixt the denouncer and this pursuer, who having satisfied the denouncer, had obtained relaxation upon production of his acquittance; in respect whereof, the LORDS found, That the production of the extract satisfied the production, therefore they would not grant the certification for not production of the principal letters. It was *alleged*, that the contrary was done betwixt the Laird of Kinneir, younger and elder, but that proceeded upon the officers' deposition, who declared he could not clearly answer in the improbation of the executions, and depone thereintil, while first he saw his own execution and subscription.

Fol. Dic. v. 2. p. 85. Haddington, MS. No 1638 and 1643.

1609. December 13.

LAIRD RUTHVEN *against* KERR.

No 6.

A pursuer was debarred by a horning, although the writ which he founded on bore to be entered into for the behoof of another who offered to insist.

THE LAIRD of Ruthven's taking burden upon him for my Lord of Dirleton, contracted with Andrew Kerr and young Innermerk, anent the conquest from them of the lands of Fenton; in the which contract, Ruthvens took them bound to pay certain farms to my Lord of Setoun, or to him to my Lord of Setoun's behoof, and thereupon having charged Andrew Kerr to pay the said farms, and litiscontestation being made in the cause at the term of probation, witnesses being produced, Andrew Kerr gave in horning against Ruthvens. It was *alleged* the horning could not stay the reception of the witnesses, because Ruthven was not contractor nor party in this cause to his own behoof, but to my Lord of Setoun's, and therefore the witnesses behoved to be received to my Lord of Setoun's effect, to whose commodity Ruthven's pursuit tended; nevertheless, because the charge was raised by Ruthven, and the suspension only raised and executed against him, the LORDS found no process in respect of the horning.

Fol. Dic. v. 2. p. 84. Haddington, MS. No 1682.

1609. December 21.

DOIG *against* DEMPSTER.

No 7.

A MAN summoned his party, who has put him to the horn, to hear and see him decerned to be restored, because the debt is paid to him, which he refers to his oath. THE LORDS will give no process to the pursuer, being debarred by that same horning.

Fol. Dic. v. 2. p. 85. Haddington, MS. No 1710.

1024. July 15.

DICKSON Apothecary *against* L. COLDINGKNOWS.

No 8.

The verity of a libel being referred to a defender's oath, the Lords found the pursuer could not exclude the defender from deponing, by a horning.

IN an action pursued by Thomas Dickson apothecary, *contra* the L. Coldingknows, where the summons being admitted to the pursuer's probation, and referred to the defender's oath of verity *simpliciter*, and at the terms assigned to that effect, the defender offering to depone and give his oath, he was debarred by a horning produced by the pursuer against him, whereby he *alleged*, That he could not depone but should be holden as confessed, being rebel. THE LORDS found, That in this, and the like cases, the pursuer could not exclude the defender to depone, nor obtrude horning against him to debar him, seeing he craved his oath for his probation, and had warned him to compear to give his oath; and therefore could not refuse that whereof he himself had made election, and which was desired by him; and so the horning was not admitted, in respect it was a severe consequence to hold the defender *pro confesso* upon a libel which might possibly contain more than the defender was worth being so debarred, and there being no other probation; but it is to be adverted, that in all the causes almost, where parties defenders are summoned, this reason may exclude all pursuers to debar the defenders by horning; for it may be alleged, that seeing they are summoned to hear decreets given against them, or else to allege a cause in the contrary; by the same reason, they may say, that seeing he is summoned to allege a cause why the pursuer should not have his intent, he ought not to be debarred by horning to propone lawfully that which by the pursuers summons is permitted to him to do; and in these cases, the defenders not the less may be debarred by hornings.

Act. Chair & ———.

Alt. ———.

Clerk, Hay.

Fol. Dic. v. 2. p. 84. Durie, p. 138.

1626. June 14.

DONATAR of the L. FOULIS's Escheat.

No 9.

A person pursued declarator of another's escheat, and produced a separate horning, by which he offered to debar him from defending. Found, that the defender ought to be relaxed, before he could proceed in his defence.

IN a declarator sought of the Laird of Foulis's liferent, the gift being granted upon diverse hornings therein specially mentioned, whereof some were produced and used by the donatar, whereupon he craved the declarator; and another was produced to debar the defender *a defendendo*, which he declared he used only to that effect to debar him, because he was rebel unrelaxed, and used it not to recover declarator thereon, albeit it was also expressed in the gift; and the defender offering to improve the same, and alleging, that so he could not be debarred thereby till it was tried if it was false or true; and the pursuer *answering*, That he could not be heard to compear to propone either improbation or any other allegiance so long as he stood rebel unrelaxed. THE LORDS found, That he ought to be relaxed or ever he could be heard to propone im-

No 9. probation, seeing that horning, albeit it was contained in the gift, yet it was not used by the pursuer to recover declarator thereon, but only to debar him.

Alt. *Russel.*

Alt. *Lawtie.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 85. Durie, p. 202.

*** Spottiswood's report of this case is No 4. p. 5732, *voce* HORNING.

1628. *June 13.*

RULE *against* L. AITON.

No 10.

In a libel of count and reckoning, in which no specific sum was concluded for, the defender offered to account, yet the pursuer was allowed to debar him by horning.

IN an action of compt and reckoning at the instance of James Rule against the Laird of Aiton, the defender being debarred by the pursuer by horning, and the defender *alleging*, That the pursuer could not debar him by horning, seeing he offered instantly to compt and reckon with him, which being the desire of his summons, it was the only thing which could be decerned in this process in favours of the pursuer; and the defender being ready to do and fulfil that, for the which sentence alienarly might be given, viz. to compt and reckon, therefore he could not be debarred from doing of that which the decreet could decern him only to do. THE LORDS, notwithstanding of the allegiance and offer to compt, found that he was debarred, and so in respect that he was at the horn, that he had not a person to stand in judgment, and decerned; which decreet extended only to ordain the defender to compt, which was offered as said is, without any sentence, but in respect of the horning refused, yet the LORDS declared that they would give suspension without caution, seeing the decreet being only general for compt and reckoning, not containing a special sum, it was hard to find cautioners in such generals, not being certain nor special in the quantity of the sum, nor liquidate what the same was.

Act. ———.

Alt. *Belsbes.*

Clerk, *Hay.*

Fol. Dic. v. 2. p. 85. Durie, p. 374.

*** This case is reported by Spottiswood, No 5. p. 5732, *voce* HORNING.

No 11.

1629. *January 29.*

KELLIE *against* WINRAM.

CIVIL rebellion debars a Judge from the exercise of his office, and he may be declined upon that head.

Fol. Dic. v. 2. p. 85. Durie.

*** This case is No 28. p. 7313, *voce* JURISDICTION.

1629. July 4. CORBET of Ardill *against* His NEAREST of KIN.

No 12.

L. ARDILL compearing in a summons, as use is, for choosing his curators, and one of the minor's kin compearing and producing horning against two of the curators; and these curators *alleging* that they might be curators to the minor, notwithstanding they were at the horn, because if they should be thereby secluded, the minor would sustain the prejudice and not they, for so the minor would want authorizing to do his affairs: THE LORDS found, That none at the horn being alleged and shown, could be curators to minors, nor suffered to compear to do any act to be expedite in judgment before they were relaxed; and albeit caution uses to be taken for curators, yet that supplies not to make rebels to be admitted to such charges by judicial acts.

Act. Nicolson.

Alt. ———

Clerk, Hay.

Fol. Dic. v. 2. p. 86. Durie, p. 456.

* * Spottiswood reports this case :

1629. July 2.—A MINOR having chosen curators at the bar, it was *objected* against one of them by the minor's tutor, that he was lying at the horn, and so could not administrate the minor's goods. THE LORDS thought it relevant, and repelled him until he was relaxed.

Spottiswood, (TUTORS and CURATOR.) p. 347.

* * This case is also reported by Auchinleck :

1629. July 2.—A CURATOR being chosen by a minor, and being at the horn, cannot be admitted till he be relaxed.

Auchinleck, MS. p. 29.

1629. July 17.

Earl of CASSILLIS, Supplicant.

No 13.

THE Earl of Cassillis being minded to serve himself heir to one of his predecessors, upon the day of his service gave in a bill, shewing that it might be, that the Earl of Wigton, who thought himself interested by the service, might press to debar him from secret hornings that he knew not of, desired therefore that the Lords might grant him in person to stand in judgment in case any horning were produced against him, and he should instantly find caution for satisfying the cause contained in the horning. THE LORDS refused the bill as a novelty.

Fol. Dic. v. 2. p. 86. *Auchinleck*, MS. p. 86.

No 14.

1630. February 18.

WRIGHT against WRIGHT.

THE defender producing a horning to debar the pursuer *ab agendo*, and the pursuer producing a ticket subscribed by the party at whose instance the horning was execute, whereby he declared he would not use that horning against him, and disassented that this party, or any other, should use the same against him to debar him from his pursuit: THE LORDS found that, notwithstanding of the said writ, any persons might produce horning against the rebel, albeit the party would not use the same at whose instance it was execute; for, as long as he was rebel unrelaxed, he could not have process, and being unrelaxed, any party might propone and produce the horning; but found, that this ticket would be a good ground whereupon the rebel might seek to be relaxed to have *personam standi in judicio* in that pursuit, albeit thereby he would not be simply relaxed therefrom.

Act. ———.

Alt. Mowat.

Fol. Dic. v. 2. p. 84. Durie, p. 493.

. Auchinleck reports this case :

A HORNING being produced by a pursuer to stay his party *ab agendo*, although the said horning was executed at another man's instance, and the defender had purchased a warrant from him at whose instance he was denounced, that he would not use that horning to repel him *ab agendo*, yet seeing he remained rebel, the LORDS would not give him process, but granted him relaxation upon the said warrant to the effect only that he may have *personam standi in judicio*.

Auchinleck, MS. p. 86.

No 15.

1630. June 19.

E. CRAWFORD Supplicant.

An heir about to be served was protected by the Court from being debarred, because no creditor would be prejudged, and because he would have lost his action by prescription, if delayed.

A SUPPLICATION given in to the Lords at the E. Crawford's instance, craving, That seeing he was to serve himself heir to some of his predecessors before the expiring of the time of prescription, and that sundry of his creditors or other persons might produce hornings against him, whereby the Judge before whom his briefes were to be served might be hindered to proceed therein, and he would lose the benefit of the prescription; therefore that the LORDS would give command to the Judge to proceed, notwithstanding of the hornings to be produced by any person, and to dispense therewith: THE LORDS found that they could not grant such a warrant, nor dispense therewith, that not being proper for them to do; but they ordained and found, that the supplicant should have

a general relaxation and suspension from all hornings whatsoever, without necessity to express any particular, and which he might execute by a general execution of relaxation at the market-cross of Edinburgh without necessity of any particular citation, and which they declared they would grant, and granted the same to that effect, that his brieves might not be staid, but that the Judge and assizers might proceed therein notwithstanding of any hornings to be produced against the impetrator of the brieves; and, albeit there was a contrary supplication given in by the creditors and others who were infest in the lands by the Earls of Crawford, that the hornings might have that effect which in law they ought to produce, yet the other bill was granted, and the creditors' bill refused; for the LORDS found that the service would tend to the creditors' benefit.

No 15.

Fol. Dic. v. 2. p. 86. Durie, p. 520.

* * Auchinleck reports this case :

1630. *June 22.*—NOTWITHSTANDING that the LORDS refused a general relaxation from all horning to the Earl of Cassillis upon the day of his service, yet the like favour being craved by the Earl of Crawford and the Laird of Coss, by bill, the day of their service to one of the Earl of Crawford's predecessors; the LORDS granted the desire of the bill, only *ad hunc effectum*, that they might have place to stand in judgment till they were served, without caution, which singular favour was granted for two respects; *1mo*, Because, by their service, no creditor would be prejudged, but the debtor made more able to give his creditor satisfaction; *2do*, In respect the prescription was so near, and if they lost this day, they lost their action for ever.

Auchinleck, MS. p. 87.

1631. *March 8.*

CHISHOLM against M'DOUGALL.

IN a pursuit at Walter Chisholm's instance, as assignee constituted by the Goodwife of Gallashiels, and John Hume her spouse, against Sir William M'Dougall, for payment of certain duties of lands pertaining to her in terce, intromitted with by Sir William, wherein horning being produced against John Hume, spouse to the said Goodwife of Galashiels, in respect whereof he *alleged*, That no process could be granted at the assignee's instance; the LORDS found, That seeing the assignee declared that this pursuit was moved to the behoof of his cedent the Lady Galashiels, albeit the assignee was not at the horn, yet the cedent's husband being at the horn, as the said horning would have debarred her of it if it had been pursued at her own instance and her said husband's, so it should also stay the process at the assignee's instance, being done to their use, as said is; which was so found, albeit the principal party, viz. the Goodwife of

No 16.

Competent to any party, though neither creditor nor donatar, to object, *non persona standi.*

- No 16. Galashiels, was not at the horn, and albeit the horning was only produced by the defender, who was neither creditor nor donatar; and that no donatar nor creditor used the same, and though it was to stay process for the Lady's means of her alimment.

Act. ———.

Alt. Nicolson.

Clerk, Gibbon.

Fol. Dic. v. 2. p. 84. Durie, p. 577.

* * Spottiswood's report of this case is No 9. p. 5734, *voce* HORNING.

1632. *March 6.*REDICKS *against* DALBATIE.

No 17.

IN a suspension of a decret for payment of the duties of lands, the suspender being debarred by horning execute against him at the charger's instance, and his cautioner in the suspension desiring to be admitted to produce the suspension, and to insist therein; and the charger renouncing all action against the cautioner, *alleging* him to be irresponsible; and thereafter one Maxwell, who, as Magistrate, being charged to take the rebel, was pursued *actione subsidiaria* for the sum, he desiring to insist in the suspension as the party whom the same concerned. THE LORDS found, That neither the cautioner, nor the Magistrate convened, could be heard to insist in this suspension, the cautioner therein being irresponsible, except that a cautioner were found good and responsible by the party, or one of those compearing, to pay the debt libelled, in case they prevailed not in the suspension.

*Fol. Dic. v. 2. p. 85. Durie, p. 626.*1636. *July 8.*L. COLSTON *against* LO. CRANSTON.

No 18.

An excommunicated person may insist in a process.

IN a suspension of a decret of removing obtained by the Lo. Cranston against Colston, wherein a sentence of excommunication being pronounced and extracted against Colston for incest, in respect whereof the charger *alleged*, That he had no person to stand in judgment; the LORDS found, That the suspender ought to be heard to insist in his suspension notwithstanding that he was so excommunicate, seeing he was not at the King's horn; for they found, that excommunication could not prejudice the party of these things, *quæ sunt juris naturalis vel juris gentium*, as was to defend themselves with their lawful rights; but I think, and then was of the mind, that a person excommunicate for so vile a crime as horrible incest, which was fearfully related and aggravate in the sentence, bearing 'the party to have lain in double incest (for so were the words of the sentence) and that for no admonition he could forbear,' ought not to be admitted to have any favour in any civil judicatory, which was not granted to

a rebel at the King's horn, except that he had satisfied the kirk and made repentance, and the sentence had been suspended some way; for any at God's horn should be refused in all things which are refused to a rebel to the King; but the LORDS ordained him to find caution to satisfy the kirk, and this was repelled, for he might defend notwithstanding thereof, as a suspender is compted; but the canon law permits not any excommunicated person to pursue.

Act. Craig.

Alt. Belsbes.

Clerk, Gibson.

Fol. Dic. v. 2. p. 84. Durie, p. 812.

No 18.

1674. January 24.

BLAIR against BLAIR.

GLASCLUN having pursued Ballerd for payment of certain feu-duties, he proponed a defence. The pursuer debarred him with horning. It was *alleged*, That this horning being but a denunciation at the cross of Edinburgh, where the defender lives not, it was null contrary to the act of Parliament, requiring 'denunciations to be at the head burgh of the jurisdiction where the denounced dwells;' and therefore, upon denunciations at Edinburgh, no escheat falls, nor is any relaxation requisite, and so thereby parties were never accounted as rebels, not having *personam standi in judicio*. It was *answered*, That albeit escheats fall not upon such hornings, yet they are not null, for caption is always sustained upon them, and so they watch the person, though not the estate of the denounced. It was *replied*, That such hornings are truly null, and though long custom hath sustained captions execute upon them, whereby the party being present, is put either to satisfy or suspend, yet that is not to be enlarged or drawn in consequence to put the lieges to the necessity to relax from such hornings.

THE LORDS found that the denunciation at the cross of Edinburgh could not hinder the party denounced to have *personam standi in judicio*.

Fol. Dic. v. 2. p. 84. Stair, v. 2. p. 256.

No 19.

Horning at the cross of Edinburgh against a person not residing in the shire, though it is a warrant for caption, does not debar the party from standing in judgment.

1704. June 15. ARNAULD and GORDON against BOICK.

STEPHEN ARNAULD merchant in Rouen, and Gordon his factor, pursue William Boick merchant in Edinburgh, for the price of a parcel of hats, and some counterfeit pearl sent home to him. Boick *alleged*, The Caudebeck hats were disconform to his commission, and not of the size and fineness required; and therefore, by the *ædilitium edictum*, he ought to take them back again, or *actione quanti minoris* deduct proportionally a part of the price. *Answered*, He could not reclaim now, seeing he had accepted them without any protestation or complaint, and paid for them at the custom-house at Leith, and had

No 20.

The subjects of countries at war with our's, have no *persona standi* here.

No 20.

disposed and sold of the hats. And this being admitted to the pursuer's probation, and coming in this day to be advised; Boick *alleged*, No process at Arnould's instance, because, being a subject of the French King's, with whom we are at war, they can pursue no action during the dependence and continuance of the war; for *hostes publici*, as they have not *jura commerciorum*, so neither have they *legimam personam standi in judicio*, nor *jus persecuendi actiones*. And, if this were the cause of a Scotsman pursuing a Frenchman before the Parliament of Paris, he would not only be denied action, but the sum would be confiscated to the public; which is not here craved. *Answered*, Whatever the authors of the war may deserve, or merchants may suffer by captures of their ships and goods at sea, yet it is hard to extend it to private persons craving their just debts, the denying whereof is against the faith of trade; and by the late act of Parliament 1703, allowing an indirect trade with France for importation of wines, this rigour seems to be dispensed with. THE LORDS refused to sustain process at the French merchant's instance. Then Gordon produced a bill of exchange giving him right to the sum, which the LORDS likewise repelled; because the summons was not pursued in his name on that proper right of his own, but only as factor for Arnould, and would not let him transform his summons thus by way of reply.

Fol. Dic. v. 2. p. 84. Fountainhall, v. 2. p. 230.

1706. July 10.

WALTER YOUNG *against* GEORGE YOUNG, Merchant in Edinburgh.

No 21.

Assignment to a plea granted for the cedent's behoof, after he had been debarred *ab agendo* by a registered horning judicially produced; sustained to allow process to proceed at the assignee's instance, without regard to the personal objection against the cedent, who continued unrelaxed.

WALTER YOUNG having charged his brother George upon his back-bond, to denude of some bonds that were in trust in his person, he suspended, and at discussing of the suspension, the charger being debarred *ab agendo* by a registered horning, he then assigned his charge to James Dundas of Breistmill. When the assignee insisted, it was *alleged* for the suspender, That the horning against the cedent must debar the assignee *quia pendente lite nihil innovandum*, and the *jus quæsitum* to the suspender, by the sustaining his defence upon the cedent's not having *personam standi* could only be taken away by a relaxation; especially considering, that the assignation to Breistmill is gratuitous for the cedent's behoof.

Answered for the charger; The debarring *ab agendo* by a registered horning being odious, and merely a personal objection, affording no advantage to the proposer, cannot meet the assignee who has *personam standi*. Nor has the suspender any prejudice by admitting the assignee to supply the fictitious legal incapacity of the cedent; since the suspender is not excluded from any defence or manner of probation competent against the cedent; and so *nihil innovatur* by the assignation to the suspender's disadvantage, as he could pretend no *jus quæsitum* by debarring of the cedent except a delay.

THE LORDS repelled the objection against Breistmill, that his cedent was debarred, and sustained process at his instance, though the assignation was for the cedent's behoof.

No 21.

Fol. Dic. v. 2. p. 85. Forbes, p. 120.

* * * Fountainhall reports this case.

WALTER YOUNG of Winterfield, pursues George Young merchant in Edinburgh his brother, for L. 1000 Scots, he had uplifted of his. *Alleged*, The debt was owing by Campbell of Lawyer's father, and he had got as much for it as any other of his creditors; but seeing he refused to stand to that transaction, but rigidly craved him to hold count for the whole, he was necessitate to use any remedy law gave, and so he produced a registered horning, and debarred him *ab agendo*. Upon this, Walter assigned the debt to Dundas of Breastanbrea; and he insisted; it was *alleged*, That this was *fraudem legi facere*, to make an assignation *pendente lite*, especially being gratuitous, and without any onerous cause, and contrary to that brocard of law, that *lite pendente nihil est innovandum*; and there being a *jus quæsitum* to him, it could not be taken away by any such collusive deed, else that effect of civil rebellion taking away their *personam stanti in judicio* is not worth a rush, but can be eluded by assigning the next moment after it is objected; and the only remedy law knows is relaxation, and if he will not follow that method which law prescribes, *sibi imputet*, and till that be expedie, the defender is free from that instance, and not obliged to answer his gratuitous assignee. *Answered*, Debarring by horning is odious, and founded on feudal delinquency, where oft-times it is impossible for the poor debtor to obey the will of the letters; and is only a personal objection that meets the rebel himself, but not his assignee; and the defender shall have no prejudice, for the assignee declares, that whatever can be said against his cedent shall malitate against him, and if he have any thing to prove by his oath, he shall get it. THE LORDS found the objection personal, and could not meet the assignee, but he might carry on the process notwithstanding. Some of the LORDS thought the regular way was by letters of relaxation, which may be got without suspending the debt, and so does little wrong to the creditor; but the plurality sustained the assignation, in respect of his declaration, that whatever was competent against the cedent, either *in causa* or *per modum probationis*, should meet the assignee; only the assignation is much cheaper than by expediting letters of relaxation, which burdens him with paying 20 merks to the treasury for the escheat goods.

Fountainhall, v. 2. p. 341-

1749. December 7.

CROMBIE against DUGUID.

No 22.

In what cases
a denuncia-
tion bars a
defendendo as
well as *ab*
agendo.

ELSPETH CROMBIE pursued Patrick Duguid of Auchinhove in a spuilzie, and when compearance was made for him, she opposed his being allowed to defend, in respect he stood fugitate by sentence of the Lords of Justiciary at the Circuit Court held at Aberdeen in spring 1749.

Accordingly the LORDS 'found that he was debarred *a defendendo*, not having *personam standi*;' and this agreeable to the established practice, which never permits rebels to compear or have the privilege of subjects, except in the case where the process requires the personal presence of the defender; such as, where the libel is offered to be proved by the defender's oath, or where he takes a day to produce a progress, or the like. And a petition was refused, praying an alteration in respect he was not yet denounced on the sentence of fugitation.

But nevertheless, a proof of the facts was still necessary, which were not to be taken for truth, upon the pursuer's averment.

Kilkerran, (PERSONA STANDI.) No 1. p. 402.

*** See D. Falconer's report of this case No 81. p. 4775. *voce* FORFEITURE.

See APPENDIX.

PERSONAL AND REAL.

S E C T. I.

*Debita fundi.*1590. August —. LAIRD OF ST MONANCE *against* TENANTS.

THE Laird of St Monance being minor, and his lands fallen in ward, there was decerned be a decreet of the Lords, the sum of 500 merks for his sustentation. He having pursued the donatar of the ward, viz. the Laird of Keltie, his goodsir, principal donatar, his father, brother Mr Thomas, Mr David, and Andrew, to pay the said sums *pro rata*, according to the portion of the land they occupied; they having suspended his letters, it was found by the LORDS, that the said Laird had good action to pursue the tenants and acceptors of the ward lands for his aliment that was modified for him, 'quia fuit onus reale et non personalæ et sequebatur fundum,' except so much of the lands as appertained to his mother, as her conjunct fee.

Fol. Dic. v. 2. p. 62. Colvil, MS. p. 453.

No 1.

The aliment of a minor out of ward lands, found to be *debitum fundi*, so that he might pursue the occupiers of the lands for it.

1628. March 12. LAIRD OF LAURISTON *against* SHERIFF of the MERNs.

IN an action of suspension betwixt the Laird of Lauriston and the Sheriff of Merns, the LORDS found, that any party, who had obtained precepts out of the chancellery, upon his retour, for taking sasine of lands whereto he was returned, as heir to his predecessor, was subject to pay the quantity of the relief, upon a personal charge, at the king's officers' instance, viz. the treasurer, against him to that effect, or that the ground might be poinded therefor, or the

No 2.

The casualty of relief is *debitum fundi*.

- No 2. Sheriff might be compelled to pay the same, who for his relief might poind the ground, or charge the party obtainer of the precept out of the chancery, personally to pay the same, and which the LORDS found the parties might be compelled to pay, albeit he never took sasine by virtue of the said precept, conform to the 74th act of Parliament, 1587; and albeit the lands lay in non-entry ay and while sasine were taken. See RELIEF CASUALTY OF.

Fol. Dic. v. 2. p. 62. Durie, p. 359.

* * * Spottiswood reports this case :

ALL Sheriffs, &c. are charged in their accounts to the Exchequer, according to the book of *responde*; and therefore if one take out a precept of sasine out of the chancery, albeit he never take sasine thereupon, yet the Sheriff will be charged for the duties of the land, because of the *responde*, and he will have his relief of the party obtainer of the precept, not only by poinding of the ground, but will also have personal action against him for the same.

Spottiswood, (FISCUS.) p. 132.

- No 3. 1635. November 14. DICKSON against A DONATAR.

THE casualty of marriage is a *debitum fundi*.

Fol. Dic. v. 2. p. 62. Durie.

* * * This case is No 4. p. 2169., *voce* CHARGE TO ENTER HEIR.

- 1664, July 13. GRAHAM of Hiltoun against The HERITORS of CLACKMANNAN.

No 4.

Land-tax not *debitum fundi*, and therefore not good against singular successors.

GRAHAM of Hiltoun having obtained a decret against the Heritors of Clackmannan, for a sum of money imposed upon that shire, by the committee of estates; the Heritors of the shire have raised a review, and alleged, that this decret being obtained before the commissioners, in the English time, he has liberty to quarrel the justice thereof, within a year, conform to act of Parliament; and now alleges that the said commissioners did unjustly repel the defence proponed for singular successors within the said shire, that they ought not to be liable for any part of the said imposition, having acquired their rights long after the same, and before any diligence was used upon the said act of the committee. It was *answered*, that there was no injustice there, because this being a public burden imposed upon a shire by authority of Parliament, it is *debitum fundi*, and effecteth singular sussesors, especially seeing the act of the committee of estates was ratified in the Parliament 1641; which parliament and committee, though they be now rescinded, yet it is with express reservation of

private rights acquired thereby, such as this. The pursuer answered, that every imposition of this nature, though by authority of Parliament, is not *debitum fundi*, but doth only effect the persons having right the time of the imposition, whereanent the mind of the late Parliament appeareth in so far as, in the acts thereof, ordaining impositions to be uplifted during the troubles, singular successors are excepted. It was answered, *exceptio firmat regulam in non exceptis*, such an exception had not been needful, if *de jure* singular successors had been free. It was answered, many exceptions, though they bear not so expressly, yet they are rather declaratory of a right, then in being, than statutory, introducing a new right.

THE LORDS found singular successors free, and reduced the decret *pro tanto*.

Fol. Dic. v. 2. p. 63. Stair, v. 1. p. 212.

1670. January 8.

MR LAURENCE CHARTERS against PARISHIONERS OF CURRY.

MR LAURENCE CHARTERS, as executor confirmed to Mr John Charters minister of Curry his father pursues the parishioners for 1000 pounds for the melioration of the manse of Curry, conform to the act of Parliament 1661, which is drawn back to the rescinded act of Parliament 1649. It was alleged by the parishioners, absolutor; *first*, Because the meliorations of the manse were long before any of these acts, which do only relate to meliorations to be made thereafter, and for any thing done before *ædificium solo cedit*, and it must be presumed to be done by the minister *animo donandi*, there being no law when he did it, by which he could expect satisfaction; *2dly*, Several of the defenders are singular successors, and so are not liable for reparations done before they were heritors. The pursuer answered, that albiet these reparatsons were done before the year 1649, yet there being subsequent acts of Parliament, obliging the heritors to make the manse worth 1000 pounds, if these former reparations had not been made, the heritors of the parish would have been necessitated to make up the same, and so *in quantum sunt lucrati tenetur*. *2dly*, The said acts of Parliament contained two points, one is, that whereas the intrant minister paid to his predecessor 500 merks for the manse, and his executors were to receive the same from his successor, the said acts ordained the heritors to free the successor, as to which the present heritors can have no pretence; and as to the allegiance, that they are singular successors, the acts oblige heritors, without distinction, whether they are singular successors or not.

THE LORDS found the Parishioners only liable for the 500 merks paid by the minister at his entry, and found, that at the time of the reparation, the Parishioners not being liable, were not then *lucrati*; and are not liable by the subse-

No 4.

No 5.

Singular successors are not liable for reparations bestowed on the minister's manse before they were heritors.

- No 5. quent acts, which extend not *ad præterita*; neither did they find the singular successors liable, but that the heritors for the time were only obliged.

Fol. Dic. v. 2. p. 62. Stair, v. 1. p. 659.

* * * Gosford reports this case.

MR LAUREECE CHARTERS, as executor to his father, who was minister at Curry, pursuing the present heritor for payment of L. 1000 for building and repairing the manse, upon the late act of Parliament; it was *alleged* for some of the heritors, that they were singular successors, and could not be liable, seeing the said expenses were not declared to be *debitum fundi*, and a real debt, which the Lords did sustain; albeit, it was *answered*, that the act of Parliament ordains all heritors to be liable without distinction. 2d, It was *alleged* for those that were heritors, the time of the reparation, that they could not be decerned but only for 500 merks, which was the most that heritors were liable to the time of the said reparation, which was before the year of God 1649, at which time, by act of Parliament, it was extended to L. 1000. THE LORDS did likewise sustain this allegiance, and restrict the sum to 500 merks, notwithstanding it was alleged, that the charges were *utiliter* expended for the heritors, who after the act of Parliament 1649 might have been compelled to make the same,

Gosford MS. No 223. p. 89.

HAMILTON of Monkland against MAXWELL.

- No 6. UPON the report of Redford, betwixt Hamilton of Monkland and Maxwell, the LORDS found, that a debt due by a person who had disposed his land upon the account that a manse was built, and that he was resting his proportion of the charges, is not *debitum fundi*.

Clerk, Hamilton.

Fol. Dic. v. 2. p. 62. Dirleton, No 274. p. 133.

1675. June 23. & July 16.

DOUGLAS of Kilhead against His VASSALS.

- No 7. THE retoured duties which are only due before citation in the general declarator of non-entry, are *debita fundi*, but the superior's claim to the full duties thereafter, is only a personal action against intromitters,

Fol. Dic. v. 2. p. 62. Stair. Dirleton.

* * * This case is No 36. p. 9318. *voce* NON-ENTRY.

1675. June 24.

SNOW *against* HAMILTON.

EDGERTOUN SNOW as assignee to the relief due by act of Parliament to the heritor, whose lands were designed for a glebe to a minister, having obtained decret against Hamilton of Munkland for the proportional part that befel his lands in the parish; he gave in a bill of suspension; and the LORDS having caused the reasons to be discussed upon the bill, he insisted upon this reason, that neither he nor his land were liable for that relief, because the designation was eleven years ago, and so could only affect the heritor at that time, but could not affect him as singular successor. It was *answered*, that the relief being constituted by the act of Parliament, it became *debitum fundi*.

THE LORDS found, that the relief by the act of Parliament, did only affect the heritor for the time, but did not affect singular successors as not being *debitum fundi*, but was like ministers stipends which burden the heritors but not singular successors.

No 7.
Relief of a
glebe, was
found not to
effect singular
successors.

Fol. Dic. v 2. p. 63. Stair, v. 2. p. 335.

*** Gosford reports this case.

1675. June 23.—THERE being some lands disposed to Mr Snow with absolute warrandice, and there being a glebe designed out thereof to the minister of the parish, and a decret given against the rest of the heritors for relief according to their proportions; there was a pursuit raised against Hamilton for his proportion effeiring to the lands now possessed by him. It was *alleged*, that that the defender being a singular successor unto these lands, long after the designation of the glebe, he was not liable to any relief decerned against his author, seeing a right of relief was not *debitum fundi*. And the heritor, the time of the designation, who was decerned, can only be liable to relieve, that being only a personal action against him. It was *replied*, that the act of Parliament anent designations of glebes, ordaining that the heritor, out of whose lands they are designed, should have relief out of the rest of the lands, did imply that he had a real right in all these lands until he was relieved. THE LORDS did sustain the defence notwithstanding the reply, and found that, albiet the present heritors were liable for their proportions, yet singular successors could not be distressed, seeing the lands themselves were not affected; and it was impossible that they could know any such burden, there being neither sasine nor inhibition or other diligence contained in any public register, which might be the ground of any real action against them.

Gosford, MS. p. 471. No 759.

No 9.

1676. July 6. BLAIR of Kinfawns against Mr THOMAS FOWLER.

IN the case betwixt Sir William Blair of Kinfawns and Mr Thomas Fowler, it was found, that an action, at the instance of the executors of a minister, for building a manse, and refunding the expenses of the same, is competent against the heritors for the time and their representatives; but not against a singular successor, and that it is not *debitum fundi*.

Reporter, *Newbyth*.Clerk, *Gibson*.*Fol. Dic. v. 2. p. 62. Dirleton, No 372. p. 182.*

* * * Gosford reports this case :

IN a reduction and suspension of a decret obtained and assigned to the minister by the relict of Mr James Oliphant against Kinfawns, before the Sheriff, for payment of his proportion of the reparation of the building of a manse, upon this reason, that the decret was most unjustly pronounced against him, who was a singular successor, and had no interest in the parish the time of the building of the manse, for which expenses the heritors for the time were only liable after valuation; but, that debt not being *debitum fundi*, but only due by act of Parliament, which imposeth it upon the present heritors, can never affect a singular successor, as was decided in the case of Guthrie against the L. Mackerston, No 74. p. 10137. It was answered for the charger, That the decret could not be reduced nor suspended upon that ground, because, by the act of Parliament, it is provided, that buildings and meliorations of manses should be valued at the incumbent's death, and belonged to the executors, and were payable by the heritors the time of the valuation; but so it is that Kinfawns was then an heritor, and as, in law, he would be obliged to pay that same proportion, if the manse had not been built, so he now enjoying the benefit thereof, he ought to be liable; and as to the case of Guthrie and Mackerston, it doth not meet that which is now in controversy, seeing he was neither heritor the time of the incumbent's decease, nor of the valuation. THE LORDS having considered this as a leading case, did suspend and reduce the decret upon the reasons libelled, notwithstanding of the answer, being chiefly moved upon the reasons, that the act of Parliament did not at all make the expenses of building and repairing of manses to be a real debt affecting a singular successor, after valuation of their lands, that they shall be liable to the incumbent or his executors; and if it were otherwise interpreted, no singular successor could be secure after a lawful purchase, seeing there is no register of such burdens, or of discharges thereof. 2do, If ministers be clearly founded in law, and never pursue the present heritors during their abode in the parish, nor after they are gone out, it is presumed that they have been satisfied, upon which grounds Kinfawns was most fa-

vourable, there being no less than 30 years since the building of the said manse, and that if he was not paid, it was more just that he being *in mora et supina negligentia*, should pursue the former heritor or his successor, than a singular successor who was no ways obliged.

No 9.

Gosford, MS. No 874. p. 555.

*** A similar decision was pronounced, 2d February 1672, Guthrie against Laird of Mackerston, No 74. p. 10137, *voce* PERICULUM.

1687. December 3. EARL of SOUTHESK against MAXWELL.

No 10.

THE Earl of Southesk pursuing Maxwell of Hills for a dry multure, payable out of his lands to a mill belonging to Southesk in Annandale, which he had appraised for cautionry, he declared on oath, that he had possessed only 12 years, and had left it in the tenant's hands; yet the LORDS advising this oath, found it *debitum fundi*, and decerned against him.

Fol. Dic. v. 2. p. 62. Fountainball, v. 1. p. 487.

1694.

Mr JAMES MOIR, Minister at Frasersburgh, against LORD SALTON, LAIRD of TECHMUIRY, and his Other Parishioners.

No 11.

THE LORDS found, that the expense bestowed by the minister in repairing his manse was not *debitum fundi*, and affected none but the heritors and possessors at that time, and not singular successors, as was found, Mr Lawrence Charteris, No 5. p. 10165.; and found his right to foggage and grass was an annual prestation that could far less descend to singular successors; but demurred a little if my Lord Salton could be reputed one, seeing he had bought in the rights on his grandfather Philorth's estate.

Fol. Dic. v. 2. p. 62. Fountainball, v. 1. p. 601.

1724. July 22.

Colonel JOHN ERSKINE of Carnock against CHARLES BELL Writer to the Signet.

No 12.

MR Scot Sheriff-clerk of Edinburgh, in his contract of marriage with Marion Cuninghame, became obliged to employ 10,000 merks on good security to her in liferent, and to the children of the marriage in fee; and for their farther

Arrears of a widow's jointure are a real burden on her husband's estate.

No 12. security, and in corroboration of the said obligation, he obliged himself to infest her for her liferent, and the children in fee, in certain subjects within the town of Mussleburgh; upon which he gave her sasine *propriis manibus* in October 1689, and in the year 1705 she adjudged for the inlacks of her provision.

The deceast Mr Andrew Ure having adjudged the same subject *anno* 1692, there arose a competition betwixt Mr Bell, who had acquired right to Ure's adjudication, and the Colonel who had right to the relict's. Mr Bell was preferred upon his adjudication, as prior; but there occurred a question, 'Whether or not the Colonel was preferred on the contract of marriage and infestment, though it was not an infestment of annualrent, and albeit no adjudication had been deduced thereon; and whether the relict's right of liferent was of such a nature, that in case she had not got full payment of her provision stipulated by the contract, the inlacks could be charged as a real debt upon the common debtor's estate, now when the liferent was determined?'

It was *pleaded* for Mr Bell, *1mo*, That where land are burdened, and made a security for a sum of money, they are disposed expressly in security, which is explained in the clause of infestment, and made an explicit provision, that they are to stand and remain affected, ay and while the sum for which security is granted shall be satisfied and paid; but in the present case it is not so, for the precept bears a warrant to infest her for her liferent use; and though the sasine *propriis manibus* cannot be said to proceed on a precept, yet it bears expressly to be given to her for her liferent, and the symbols are the same which are used in infestments of property, or rights of liferent of lands, and no money given and delivered as a symbol, which is always done, where the intention is, that there should be a money debt upon the subject, or an annuity of money; her liferent right therefore must resolve into a locality, establishing to her a right to uplift the mails and duties while her liferent did subsist, but could last no longer than till her decease, and consequently there could be no claim thereafter for inlacks. *2do*, Whatever might be the import of the contract, yet since the precept of sasine did only grant warrant to infest her in the subjects for her liferent use, that was sufficient to determine the nature of the right, and no person was obliged to regard any other condition not express in the sasine.

On the other hand, it was *contended* for the Colonel, *1mo*, That it appeared from the contract, that Mr Scot's intention was, in all events, to secure his spouse in the annualrent of 10,000 merks, for which he expressly obliged himself, and to infest her for security; wherefore she being infest, the annualrent stood secured to her by the sasine, and the subject was impignorate to her for payment thereof; and as there could be no doubt, but if children of the marriage had existed, they would have been secured in the fee by the infestment, so the annualrents must be secured to the mother in the same manner: And besides, this is one of those infestments for security, which though distinct

from infeftments of annualrent, yet are equally burdens on the fee of him who grants them; Lord Stair, b. 4. t. 35. § 24. *2do*, That the sasine contained at full length the obligation to infeft, and the obligation being to grant infeftment for security of annualrents, the sasine must be interpreted in a congruity with it. It is true, that she was only infeft for her liferent-use, yet that was not the liferent-use of the subject, but of the sum secured upon it by infeftment; for she could have touched no more than to the extent of the annualrent, whatever had been the value of that subject. And, *lastly*, That the meaning was the same, as if she had been infeft *per expressum* in an annualrent, though in different words; and though all the conditions in the contract had not been narrated, yet the infeftment bearing to be given conform to the tenor thereof, singular successors were bound, before they could purchase *bona fide*, to look into the conditions of the contract.

THE LORDS found, that the inlacks of the jointure were a real burden, and that the adjudication was to be drawn back to the date of the infeftment.

Reporter, *Lord Royston*. For the Colonel, *Cha. Erskine*. Act. *Allen Hay*.
Clerk, *Machenzie*.

Fol. Dic. v. 4. p. 63. Edgar, p. 99.

1762. February 3. COLLEGE OF ST ANDREWS *against* CREDITORS OF NEWARK.

IN the year 1477, John Kinloch of Cruivie, granted to the friars predicators of St Monance a perpetual annuity of L. 20, to be levied out of his lands of Invery, part of the estate of Newark. A sale of this estate being brought before the Court of Session, upon the bankruptcy of the proprietor, appearance was made for the College of St Andrews, who had right by progress to this perpetual annuity; and craved to have it declared as a condition in the articles of roup, that the estate should be burdened with payment of the said annuity. The Court had no hesitation to grant the prayer of this petition, even against a purchaser of the said lands of Invery, though the annuity was a rent-charge only, and never clothed with infeftment. The reason was, that rent-charges were customary in Scotland before infeftments of annualrent were introduced; and they were real rights even without infeftment, so as to be effectual against all singular successors. What is curious in this case, is to find rent-charges subsisting in Scotland even to this day. And it is remarkable, that here is a real right upon land against which the records afford no security to a purchaser.

No 13.
Rent-charge.

Sel. Dec. No 186. p. 251.

S E C T. II.

Reversions.—Eiks to Reversions.—Reserved Faculty to Burden in a
Disposition of Lands.—Arrears of Interest of an heritable Debt.

1565. December 18.

HOME against HOME.

No 14.

One who had right to a reversion borrowed more money from the wadsetter, and granted an obligation, that the reversion should not be used by him, his heirs or assignees, till that sum were paid.

An assignee having used the order, the Lords had no respect to the second obligation.

ANENT the action pursued by Alexander Home, as assignee to the Earl Bothwell, to redeem certain lands of Prendergast from William Home of Lochtille, liferenter of the said lands, and Alexander Home, fiar of the same, and his mother and tutors for their interest, it was *alleged* by the said Alexander, That the persons defenders foresaid should be compelled, by decret of the Lords, to resign, renounce, and overgive the said lands to the said pursuer, because he caused lawfully warn the said defenders to receive a certain sum of money, contained in a reversion made by the said William Home to the said Earl Bothwell's father, to whose son and heir the said pursuer was assignee, and caused number the said money at the place affixed in the said reversion, and fulfilled the same in all points; and because the said defenders came not to receive the said money, and fulfil their part of the said reversion, lawful time and day, the said pursuer consigned the said money contained in the reversion, in the hands of —, conform to the same.—It was *alleged* by the defenders, That by no way they should be compelled to resign and overgive the said lands, nor grant the same lawfully redeemed; because, since the making of the said reversion, the said Earl Bothwell, maker of the said assignee, long before the making of the same, had received a sum of money from the said fiar of the lands, and thereupon had given him an obligation, binding and obliging him, his heirs and assignees, that it should not be leisome to him nor them to redeem the said lands frae the said fiar nor his heirs, by virtue of the said reversion, until the said sum, contained in the obligation, was first paid, which was not done as yet.—It was *alleged* by the said pursuer, That he knew nothing of the said obligation, nor it was never intimated nor shewn to him at no time, and specially at the time of the redemption; and therefore, *bona fide* he used all things contained in the said reversion, therefore the said lands should be decerned redeemed lawfully; which allegiance of the said pursuer was admitted, and the lands decerned lawfully redeemed; notwithstanding the allegiance of the defender, which was repelled.

Fol. Dic. v. 2. p. 63. Maitland, MS. p. 163.

1679. January 16.

The LAIRD of LAMBERTON *against* The LADY PLENDERGAIST.

UMQUHILE ALEXANDER HOME of Plendergaist gave a reversion of certain appraised lands to Lamberton his good-brother, from whom he had the right of appraising, in these terms, 'That failing of heirs-male of his own body and his brothers, he obliged his heirs of line to resign the lands in favour of Lamberton, and the heirs between Lamberton and his sister.' This Lamberton, as heir betwixt them, having used an order of redemption, and consigned the sum of L. 8000, on which the lands were redeemable, pursues a declarator against Plendergaist's heirs of line, both the brothers having died without heirs-male. Compareance was made for the Lady Plendergaist, who produced her infestment in these lands, and alleges that the bond granted by Plendergaist was only a substitution whereby Plendergaist preferred Lamberton to his own heirs-female; for it bears only 'an obligation on the heirs-female to denude, failing heirs-male, which are the terms of the substitution;' so that Lamberton being their heir of tailzie, he cannot quarrel Plendergaist's deed for so just a cause, as providing a jointure to his wife, though it might import an obligation not to do any fraudulent or gratuitous deed to vacuate this bond.—The pursuer *answered*, That he opposes the bond, which is no ways a substitution, but a positive obligation to denude upon payment of L. 8000; and though it be conditional, yet it is an effectual obligation, and a true reversion registered, which by the act of Parliament anent reversions is a real right, affecting the ground against singular successors, though for the most onerous causes; and therefore the Lady's infestment being posterior to this reversion registered, it cannot impede the redemption and declarator, but can only affect the sums consigned, as coming in place of the land redeemed, whereby the decret will bear, that the sums are to be employed for the Lady's liferent use.—It was *replied*, That this bond, bearing 'love and favour,' can be interpreted no further than a destination of succession, otherwise Plendergaist should have bound up himself and his heirs-male for ever that they could never sell or burden this land; for tho' his brother or he had had heirs-male to three generations, they might have failed thereafter, and thereby be incapacitated to dispoise; *2do*, This bond can be no reversion, which is *pactum de retrovendendo*, and which indeed is made real by statute; but it can only be in the case that a party infest dispoise his lands on reversion, but here Lamberton was never infest.—It was *duplied*, That this reversion did certainly hinder Plendergaist or his brother to dispoise; and tho' it were extended also to hinder their heirs-male to dispoise, there is no inconsistency; but it is like the Lords would have so interpreted the clause if there had been heirs-male; for the clause 'which failing,' in substitutions, is by our custom understood whenever they shall fail, though once heirs did exist, contrary to the interpretation of the Roman law, which by once existence of the

No 15.
Objected against a registered reversion, that not being *pactum de retrovendendo*, which is the true nature of a reversion, but granted to a third party, who had no right to the lands, it could not be good against singular successors. This objection repelled.

No 15.

institute, did wholly evacuate the substitution, 'but failing heirs,' when it is not in a substitution, but in a condition, is only meant of the immediate heirs-male; so that if either of the brothers had had an heir-male at their death, the reversion did expire. As to the second, neither law nor statute makes distinction, whether a reversion was granted to him who was formerly infeft, albeit that being the ordinary case of reversions, it is thence called *pactum de retrovendendo*, yet there are many reversions granted to other parties than the granter's authors, which being registered, are as secure and real rights as the others.

THE LORDS sustained the declarator, and repelled the defence for the Lady, and found this not to be a substitution, but a conditional reservation, and registered, and the condition purified, so that no infeftment subsequent to the reversion could exclude the redemption, but ordained the money consigned to be employed for the Lady's liferent use. See SUBSTITUTE and CONDITIONAL INSTITUTE.

Fol. Dic. v. 2. p. 63. Stair, v. 2. p. 673.

. Fountainhall reports this case:

IN the action between Renton of Lamberton and the Lady Plendergaist, the LORDS 'found Lamberton's right more than a bond of tailzie, and that it imported a reversion, and that the Lady behoved to liferent the wadset money.'

Fountainhall, v. 1. p. 34.

No 16.

An improper wadsetter became cautioner for the reversion to a third party, and obtained from the reverser a declaration; that the wadset should not be redeemed until he were also relieved of this engagement. In a competition between the wadsetter and another creditor, it was found this was only a personal obligation, and not a proper eik to the reversion.

1708. February 18. SIR JAMES DALRYMPLE against SIR JOHN INGLIS.

THE Lord President of the Session, as purchaser of the estate of North Berwick, pursues Sir John Inglis of Cramond in a declarator and reduction of Sir John's rights affecting that estate, and particularly insisted against an eik granted by Sir William Dick to Mr John Inglis, then of Cramond, in July 1651, acknowledging he had engaged for him to Mr James Whitehead of Park for L. 10,000 Scots, and that he had a wadset upon his lands for L. 20,000 formerly due, therefore declares there shall be no lawful redemption by re-paying the said L. 20,000, unless Cramond be likewise freed and liberated of the said L. 10,000 due to Whitehead; against which the President *contended*, That it was no real right, but a mere personal declaration, wanting all the essential requisites to a formal eik; for, *1mo*, It does not bear these material words, 'and hereby adds and eiks the foresaid sum to the reversion;' *2do*, It is not added to a proper wadset, but to a wadset affected with a back-tack, and yet bears nothing anent augmenting the back-tack duty; *3tio*, It bears no obligation to pay, but only that the lands shall not be redeemable till it be paid; which is no more than what all wadsets bear, that there shall be no legal nor valid redemption, till the back-tack duties, termly failzies and penalties be paid; and yet no law-

yer ever pretended that these were real ; 4^{to}, It is so far from bearing a clause consenting to the registration in the register of sasines and reversions, in which record they have put it, that it bears only a warrant to insert in the books of Council and Session, in which register they did not put it ; so it is plain, they never looked upon it as a formal or valid eik ; and therefore any intromissions Cramond had with the rents of North Berwick, must go to extinguish the L. 20,000 in the principal wadset, and can never be ascribed to the said eik, which is no better than a personal bond, and could never be the title of his intromission with the mails and duties.—*Answered* for Cramond, That he opposed his eik, which had all the materials required by law ; for though it wanted these words of adding and eiking, and a further back-tack duty, yet it materially and virtually contains them all ; for he who declares that there shall be no redemption used till this sum be paid as well as the sum in the principal wadset, says as much on the matter as if he incorporated it into the wadset, added and eiked it thereto, and declared it a part thereof. And as to the clause of registration, it is confessed that, in executive writs, where executorials are to pass on a charge of six days, there must be a formal explicit consent ; but in registration appointed merely for publication and intimation, such as that of reversions and eiks, there is no need of the party's consent, the law supplies it. And as to my father's intromissions, they cannot be ascribed and imputed to the principal sum in my wadset, but are already applied by an interlocutor of the Lords, in the act *anno* 1685, to the sum in the eik ; and which is both consonant and agreeable to the principles and analogy of law, where indefinite payment is made to a creditor having two sums owing him, the one due by caution, and the other without it, the application is made to the sum wanting caution, as the presumed will of the party to preserve his sum, which he has unquestionably secured entire, and rather to pay the less secured debt, which by a contrary application might come to be altogether lost, as was found 13th February 1680, *McRieth contra Campbell*, No 3. p. 6801.—*Replied*, The said interlocutor was obtained when Stewart of Coltness, the other competitor, was forced to flee, and was forfeited, and therefore not to be regarded ; but by a contract of communication betwixt Cramond and them in 1654, it appears no stress was laid upon this eik ; for, in deducing his rights, it is not so much as mentioned.—THE LORDS found it was not such an eik as to be a valid title for possession, and that Cramond's intromissions could not be imputed to it, but they behoved to extinguish the sum in the wadset, and therefore reduced it, as only being a personal right, which could not affect the lands ; as also reduced the said act in 1685, in so far as it found the intromissions imputable to the eik, as well as to the wadset.

Fol. Dic. v. 2. p. 63. Fountainhall, v. 2. p. 432.

* * * Forbes reports this case :

No 16.

SIR WILLIAM DICK and his sons having granted a wadset of their lands of North-Berwick to Mr John Inglis of Cramond, and John Joussie of Westpans, equally, redeemable for L. 20,000, containing a back-tack for payment of the annualrent thereof, and a clause that no redemption should be held till the whole back-tack duties, termly failzies, and all other sums, wherein these wadsetters should be creditors to Sir William, were satisfied, together with the principal sum ; Sir William also granted a declaration apart thereafter, in July 1651, bearing, ' That Cramond, Joussie, and others therein mentioned, were engaged to Mr James Whitehead of Park for the sum of L. 10,000, borrowed and applied for Sir William's use and behoof ;' and declaring, ' That the wadset right should not be redeemable, upon repayment of the foresaid L. 20,000, annualrents, and expenses thereof, unless they were freed of their engagement for the L. 10,000, annualrent, and expenses.' This declaration bears only a clause of registration in the books of Council and Session, that letters and executorials may pass thereon ; but is registered in the record of sasines and reversions. Cramond and Joussie, in August 1652, obtained, upon the wadset and declaration, a decret of mails and duties in absence, and thereby possessed the wadset lands. Sir Hugh Dalrymple, Lord President, who purchased these lands, as the highest offerer at a public roup, insists now against Sir John Inglis, in a declarator of extinction of the wadset, by his and his predecessor's intromission with the rents of the wadset lands.

Alleged for Sir John Inglis ; That his and his author's intromissions must be ascribed in payment of the principal sum and annualrents in the eik to the reversion, as well as to the sums in the principal wadset.

Replied for the President ; What Sir John Inglis pretends to be an eik, is but a declaration, bearing registration for execution, which cannot become an eik by the creditors thinking fit to record it in the register of sasines and reversions, without any special consent, paction, or design on the debtor's part to make it real ; which did not in the least alter the nature of the obligation, more than registering a personal bond in the register of sasines could make a real right ; and is of no more effect than the usual clause in the wadset itself, that expenses, termly failzies, and all other sums, shall be paid before redemption, which was never pretended to afford any title to mails and duties, or an additional back-tack duty to the wadset. An eik to an improper wadset, or to an annualrent, signifies nothing, unless the back-tack be declared void, conform to the irritant clause in the wadset ; or it contain a new back-tack duty ; or unless the infestment of annualrent contain a new annualrent. For what imports it, that the granter of an annualrent, or an improper wadset, obliges himself that there shall be no redemption till an additional sum be paid ? It is a matter of indifferency to a debtor, whether the annualrent or wadset right

be redeemed or not. If this pretended eik had the real effect to stop redemption, the President would chuse rather not to redeem, but still to lie subject to the back-tack duties. And though custom hath introduced eiks to proper wadsets, which generally are more valuable than the sums therein contained, an eik to the reversion of an annualrent, or an improper wadset, was never sustained to have any real or legal effect.

Duplied for Sir John Inglis ; Eiks adjected to reversions, and duly registered, have the same effect as if contained in the principal wadset ; and the infestment unredeemed is a real burden upon the ground, and a title of mails and duties for payment of sums in the eik, as well as those contained in the principal wadset. Albeit the eik doth not bear an obligation for an additional back-tack duty, or an assignation to mails and duties, yet the making the said eik to the reversion was a virtual addition to the back-tack duty, as being an addition to the principal sum in the wadset ; and the disposition and infestment, upon the principal wadset right, became a title for payment of the sums contained in the eik, as well as those in the wadset itself. *2dly*, The question here not being about the recovery of payment by virtue of the decreet of mails and duties upon the eik, as well as the wadset, but concerning the application of indefinite payments already recovered, and intromissions had by Cramond, the creditor (now that the debtor is insolvent) must have his election, and be allowed to apply the payments in satisfaction of a debt that is least secured, and in greatest hazard, February 13th 1680, M'Rieth against Campbell, No 3. p. 680r. *3dly*, There is no consent of parties requisite for registering eiks in the register of reversions, because that is for publication only ; and consent is only needful to the registering of writs, in order to execution and diligence. *4thly*, There is a great difference betwixt an eik to an improper wadset, which is a right of property, and an eik to an infestment of annualrent, which is only a servitude on the property, and so not a proper subject to bear the burden of an additional eik ; nor doth there appear any sufficient ground of difference in this case betwixt a proper and improper wadset, both being rights of property, while unsatisfied or unredeemed, though not extinguishable the same way.

Triplied for the President ; The allegiance that an additional back-tack duty doth naturally result from such an eik, is made *invita juris prudentia*, without authority or example ; and, where was it ever pretended, that a party obtaining a decreet in absence upon several titles, some good, some bad, the intromission should be equally ascribed to all ? Intromission is always imputable to a preferable right, at least to a valid right.

THE LORDS found, that the declaration produced is not such a valid eik as to be a title of Cramond's intromission, to which his possession might be ascribed, as well as if the eik had been added to the principal wadset.

Forbes, p. 244r.

1753. *November 28.* & 1755. *February 4.*

Competition of the CREDITORS of BENJEDWARD.

No 17.

Competition of creditors upon the price of a bankrupt estate, relative to arrears of interest of an heritable debt where there was one catholic creditor, and two secondary.

DOUGLAS of Benjedward, April 1739, granted an heritable bond to Lord Cranston for the sum of L. 2400 Sterling, which the same year was conveyed by his Lordship to the Earl of Cassillis, for security of the sum of L. 2000; and, upon this conveyance, infeftment was expedite. In the year 1751, the estate of Benjedward was sold by public roup, upon a process brought by the apparent heir; and the Lord Cranston was preferred, in the *first* place, for the said principal sum of L. 2400 Sterling, and for the interest due thereon, extending, at Whitsunday 1751, to L. 860 Sterling. This sum of bygone interest was arrested in the purchaser's hands by some of Lord Cranston's personal creditors; and, after the date of the arrestments, his Lordship conveyed the heritable bond, with the arrears of interest, to the Master of Ross, for security to him of a debt of L. 600. The purchaser brought all the creditors into the Court by a multiple-poining, in order to have their preferences adjusted. This case created a good deal of struggle. But, after a hearing in presence, it was found to resolve into the simple case of a catholic creditor over two subjects, and two secondary creditors, one upon each subject. The principal sum, and the bygone interest, contained in the bond due to Lord Cranston, were considered as the two subjects, the former affected by the Master of Ross, the latter by the arresters; and the Earl of Cassillis was the catholic creditor, preferable upon both subjects. After attaining this just view of the matter, the judgment was easy, namely, that the scheme of division should be so adjusted, as that the debt due to Lord Cassillis was to be taken out of the principal sum, and out of the interest proportionally; which left a residue of the principal to be drawn by the Master of Ross, and a residue of the interest to be drawn by the arresters.

The opinion of Lord Elchies was, That whatever payments are drawn by Lord Cassillis, must impute, in the *first* place, to extinguish the interest due upon the heritable bond; and that whatever residue is over, after Lord Cassillis draws the sum due to him, must be a part of the principal to be drawn by the Master of Ross. *I answered*, That this might hold by the old form of an annualrent-right, where infeftment was given for security of the interest solely; and consequently, that whatever was levied by a poining of the ground must impute into the interest; but that the present form of an annualrent-right was different, being a security for the principal as well as the interest. Hence, when the rents are levied by the poining of the ground, there is nothing in the nature of the right which bars an application either to the principal or interest, as the creditor pleases. It is true, that indefinite intromission, as well as indefinite payment, is applied first to the interest in a question with the debtor; but that this proceeds upon a principle of equity for which there is

no place when the debtor is out of the question by his bankruptcy. When this is the case, another principle of equity takes place, that the catholic creditor must act impartially, and forbear to benefit one secondary creditor by oppressing another.

No 17.

The following objection touched some of the Judges. Laying aside the Master of Ross, the arresters would be secure of their payment; for if the Earl chose to levy the interest for his payment, they would be entitled to demand from him an assignment to the principal sum. And it was thought that the arresters could not be hurt by the conveyance to the Master of Ross of the principal sum, after their arrestments were laid on. But the answer to this was obvious, that the security taken by the Master of Ross, in the course of commerce, was lawful; and that, in adjusting matters betwixt him and the arresters, with regard to the being entitled to an assignation, priority is no plea, they being *in pari casu* with regard to every equitable consideration; that is, being equally *certantes de damno evitando*, they are equally entitled to an assignation from the catholic creditor; their claim being founded upon equity, and not upon strict law.

This case was reviewed upon a petition for the Master of Ross, who *pleaded* a new point, which I thought without foundation, viz. That Lord Cranston's infestment of annualrent was totally conveyed to Lord Cassillis, and that nothing remained with the disponent but a personal reversion, which could not be affected by arrestment. The Court, 4th February 1755, altered and preferred the Master of Ross to the arresters; whether upon this new point, or upon what was formerly pleaded against the arrestments, as informally laid on in the hands of the purchaser of the estate, I cannot take upon me to say. I can only say, that there was no intention to alter the above interlocutor, which is certainly well founded, supposing the arrestments effectual to carry the bygone interest of the heritable bond. But the arresters having afterwards reclaimed, the Court, upon their petition, with answers for the Master of Ross, adhered, 9th July 1755. In advising this petition and answers, the Court lost sight altogether of the principles of equity above set forth. They adhered to their last interlocutor, upon this footing, That Cassillis was bound in law to take payment of the interest *primo loco*; that this was his duty, even after the arrestments were laid on; and, therefore, that Cassillis having done nothing arbitrarily, was not bound to grant an assignation to the arresters; nor could he justly grant it.

Sel. Dec. No 59. p. 77.

1760. August 7. Younger Children of HENDERSON against CREDITORS.

No 18.

A RESERVED faculty to burden with a certain sum, in a disposition of lands by a father to his eldest son, being exercised afterwards by way of legacy or
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No 18.

provision to the younger children; the son having contracted debts, his creditors adjudged the lands, and one of them completed his right by charter and infeftment. In a competition after the father's death, the younger children, who also adjudged, insisted for a preference, on this ground, that the eldest son's right was qualified, and that the adjudications against him could not carry the reserved right in the father, which was neither *in hæreditate jacente* of him, nor disposed to his eldest son. *Answered*, A personal deed of the father, the disposer, is not entitled to compete with creditors or purchasers who stand infeft by the proprietor. The father, in virtue of his reserved faculty, could not have a greater power than if he had reserved a part of the fee; and as, in that case, his personal deeds could not affect the lands, nor compete with real rights granted by the heir after his own fee is at an end; so it is equally inconsistent to suppose, that a personal bond or legacy granted by one who has a reserved faculty should affect the land. Such deed cannot be discovered from any record; and it would be putting lands *extra commercium* to give it the effect pleaded for by the legatees.—THE LORDS found, that the younger children were only preferable for their provision according to their diligence. See APPENDIX.

Fol. Dic. v. 4. p. 64.

No 19.

A faculty to burden, to the extent of a certain sum, being reserved in a disposition by a mother to her son, who, of even date, granted a relative personal obligation therefor; whether that sum was thereby made a real burden *de presenti*?—Whether the faculty was exercised *habili modo*, by after deeds of the mother executed with that view?

1774. July 5.

JAMES HILL against MARY HILL.

MARY CRAWFORD, proprietor of the lands of Gairbraid, did, after the decease of her husband, dispose the same to her eldest son, Hugh Hill, in his contract of marriage, and to the heirs-male of the marriage; whom failing, to the said Hugh Hill's nearest heirs and assignees, with the burden of an annuity to his wife; and reserving Mary Crawford's own liferent, with liberty to dispose of the coal and wood thereupon, during her life, as she should please.

The said contract reserves to her full power and faculty, at any time in her life, *etiam in articulo mortis*, to burden and affect the foresaid lands disposed with the sum of 8000 merks Scots money, to be destined and provided by her, either in favour of her other children, or such person or persons as she shall think fit, and in what manner she shall think proper, to be paid at the first term next after her decease, 'with the payment whereof the said lands 'shall be burdened, as well as the said Hugh Hill, his heirs and successors; 'and which reservation and provision shall, for that end, be inserted in the 'procuratories and instruments of resignation, and precepts and instruments of 'sasine to follow hereon, in time coming, during the lifetime of the said Mary 'Crawford, and until the said Hugh Hill, or his foresaids, be duly discharged 'of the foresaid 8000 merks.'

The reservations in favour of Mary Crawford are repeated in the procuratory of resignation, precept of sasine, and likewise specially inserted in the instrument of sasine.

Of the same date with the contract, Hugh Hill granted his obligation, reciting, that it was communed and agreed betwixt Mary Crawford, his mother, and him, that the said Mary Crawford should have power reserved to her to burden in manner above expressed, with the payment whereof the said lands, as well as Hugh Hill and his heirs and successors therein, should be burdened. Then follows this clause: And 'it being reasonable, that I should grant this 'personal obligation, in terms of the said communing, in corroboration of, 'and but prejudice to the heritable security therefor, by the contract of marriage; therefore I hereby bind and oblige me, my heirs, &c. to pay to the 'said Mary Crawford, her executors, legatarys, or assignees, the foresaid sum of '8000 merks Scots money, in such manner and proportions as shall be appointed by her, by a writ under her hand, at any time hereafter, *etiam in articulo mortis*; and, failing of such destination, assignation, or testament, to the 'nearest of kin of the said Mary Crawford, equally amongst them, and that 'upon the first term after her decease.'

In 1733, Mary Crawford executed a testament, appointing her seven daughters, therein named, to be her executors and legatarys, leaving to her said daughters, equally, all goods, gear, &c. which should belong to her at her death; 'together with whatever sum or sums of money, with the burden 'whereof I disposed certain lands to my son Hugh Hill; declaring hereby, 'that whether the said disposition be actually burdening the said lands, or 'whether the same be reserving a faculty to me to burden the same, I do 'hereby actually use and exercise my right thereof, and do hereby dispose of 'the said sum, to the full extent thereof, to and in favour of my said daughters 'above named, equally in manner above mentioned; willing and ordaining 'these presents to be a full and absolute conveyance of the said subjects, as if 'conceived in the most ample manner.'

In 1737, Mary Crawford executed a disposition, proceeding upon the narrative of the reservation in the marriage-contract, and of the obligation granted by Hugh Hill relative thereto; and disposing in favour of her said seven daughters, equally among them, the foresaid 8000 merks, 'wherewith the lands of Gairbraid are burdened, in manner contained in my son Hugh Hill's contract of marriage, and which is also contained in the said personal obligation granted by my son to me, with annualrents and penalty competent thereon; together with the said contract of marriage, and the said personal obligation, and all other rights in my person, for recovering the said 8000 merks, annualrents, and penalties foresaid.' She also assigns to them all goods, gear, and sums of money that should belong to her at her death.

Mary Crawford died in 1748, leaving eight surviving children, viz. Jean, Helen, Hugh, Margaret, Laurence, Anne, Mary, and Isabel.

No 19.

Mary Hill, the only child of Hugh Hill, on his death, succeeded to the lands of Gairbraid.

Some years ago, Laurence, Jean, and Margaret, obtained themselves confirmed executors, *qua* nearest of kin, to their deceased sisters Anne, Mary and Isabel, and gave up, in inventory, the proportion of the foresaid sum of 8000 merks, which belonged to them in consequence of the deeds before narrated. But Laurence Hill having afterwards been advised that this confirmation was erroneous, for that the 8000 merks, in consequence of the clause in the marriage-contract, making the same a real burden upon the lands of Gairbraid, fell to be considered as an heritable debt, descendible to the heirs of the creditors; he therefore made up titles to the shares of his younger sisters, Anne, Mary, and Elizabeth, by obtaining himself served heir of conquest to them; and, upon that title, the present action was brought in his name, before this Court, against Mary Hill, the only daughter and heir of the said Hugh Hill, the debtor, concluding for payment of three sixth shares of the 8000 merks which belonged to the said Anne, Mary, and Elizabeth Hills, to which they had right by their mother's settlement, as aforesaid; and which, upon Laurence Hill's decease, was insisted in by James Hill, his son and disponent.

Pleaded, in defence : That the debt was not an heritable subject, but moveable, and descendible to executors; for that the reservation in the marriage-contract was only a reservation of a power and faculty to burden the lands with the foresaid sum of 8000 merks, but does not, *de presenti*, burden the same therewith; besides, in the case, the creditor in whose favour the the burden was to be imposed, was altogether uncertain; and that, therefore, unless that faculty had been properly exercised by a deed, charging the debt expressly as a burden upon the lands, it would be no more than a mere personal debt, descendible to executors, and not to heirs.

Answered, The right reserved by Mary Crawford over her estate, when she disposed the same to her son in his marriage-contract, does not fall to be considered as a mere faculty, to create a burden upon the land, which she was uncertain whether she could exercise or not, but as a debt really created at the time against the disponent, and with which it is expressly declared that the lands shall be burdened; and that, for that end, the reservation should be inserted in the procuratory, &c. and which was done accordingly; so that an after infestment granted by her, in consequence of her reserved powers, became altogether superfluous. No more remained to be done upon the part of the disponent, than to point out the person or persons to whom the 8000 merks were payable, and which she might execute in any form she inclined, and which was accordingly done effectually and properly by the relative bond, which (as the marriage contract itself, containing the powers, fell to be in the hands of the disponent) she, of the same date with the contract, took from her son, payable to such persons as she should appoint; and failing her appointment, equally among her nearest of kin, or, in other words, her own children, who, in fact,

from the beginning, were creditors for that sum; and though Mary Crawford had not made use of the power belonging to her by any new nomination, their right remained intire.

The relative bond being only conceived in the form of a personal bond, does not in the least weaken the pursuer's plea; as no more remained or was necessary, than to take from the debtor a personal obligation for payment of the debt, ascertaining and pointing out the creditor to whom the same was payable.

And if the marriage contract, and the relative bond of the same date, are considered as *partes ejusdem negotii*, (which is the proper light in which they fall to be viewed) it is plain that both the sum and the creditor are defined; for, failing a particular nomination to be made by herself at any time of her life, the sum is to be given to her own children: and being evidently a real burden affecting the lands, in that view it is an heritable debt, descendible to heirs, and not to executors.

Replied, The reservation can never of itself create the burden; and it is a decided point, that, if the person who has the power of burdening dies without exercising it, the faculty is of course at an end. So the Court found very lately, in a case which seemed to be attended with a good deal of hardship, the younger children of M'Lean against their brother. See APPENDIX. The argument on the other side carries a contradiction in the bosom of it; for how can it be supposed that Mary Crawford, in the same deed, should be both burdening and reserving a power to burden? If she had understood the burden to be already created, the reservation of a liberty or faculty to create the burden, would have been altogether proposterous.

And the words laid hold of by the pursuer, 'with the payment whereof the said lands, and others hereby disposed, shall be burdened, as well as the said Hugh, his heirs and successors therein;' it is evident, are not inserted for the purpose of creating an immediate faculty to burden by the disposition then granted, but are consequential of the faculty reserved to burden; and the purport of them is to declare, that the faculty to burden the lands being exercised in a hable manner, the said lands should then be liable, as well as the person of the dispoonee, to make good the payment to those in whose favour it was conceived; but it could never be the meaning of this part of the clause to contradict the former, and to establish that the lands should be burdened, although the faculty should never be exercised, or although it should be exercised in a manner inhable to create a real burden.

Again, the relative bond had no doubt the effect of creating a personal obligation against Hugh Hill; but still this personal bond did not lay any burden upon the lands; it did not enter the register of sasines in any shape. It was not in its nature heritable, nor meant any such; nor had Mary Crawford, at that time, resolved in whose favour she was to exert the right. No singular successor in the lands would have been bound to pay the least personal regard to this bond; and the only thing he could possibly see, from the infestment upon the

No 19. contract, was, that Mary Crawford had a faculty reserved to burden the lands, as well as the person of the disponee, with the payment of 8000 merks; but he could not see that she had actually exercised it, far less in favour of whom, or in what manner.

A faculty or power to burden land, must be exercised in a manner consistent with the feudal principles, and the security of the records, otherwise it can have no effect against third parties, or to constitute a real charge. The law has appointed no record for bonds granted in pursuance of reserved powers; and, therefore, if such powers could be exercised by mere personal bonds, without infestment, so as to affect the lands, and to be good against singular successors, the greatest embarrassment would ensue. Accordingly, from the Decisions, *voce* FACULTY, it will be seen, that this Court has never, at any period, sustained a personal bond referring to a faculty, as sufficient to constitute a real burden upon lands; 8th July 1760, the younger children of James Henderson against the Creditors of Francis Henderson, No 27. p. 1441.

The Judgment pronounced by the Lord Ordinary, and which was afterwards adhered to by the Court, was as follows:

"FINDS, that the 8000 merks Scots, disposed by Mary Crawford to her daughters, were moveable *quoad* the said daughters, and descended to their nearest of kin, and not to their heirs; and, therefore, sustains the objections to the pursuer's title, assoilzies the defenders, and decerns; reserving to the pursuer to insist in a proper process against the defenders for such share of the said sum as belongs to him, as one of the nearest of kin to his deceased sisters".

Act. Macqueen.

Alt. Hay Campbell.

Clerk, Tait.

Fol. Dic. v. 4 p. 65. Fac Col. No 120. p. 321.

SECT. III.

Paction by Declarators, Back-bonds, &c. relative to Personal rights;
when real; when personal?

1630. March 24. MAXWELL against LORD HARRIES.

No 20.
A singular
successor to
the creditor
in a bond,
was found not
subject to a

THE LORD HARRIES being bound to one Maxwell by an heritable bond, in a sum of money, and to be paid upon requisition, which requisition was expressly contained in the bond, ought to be made by the advice of persons therein named, and no otherwise; this bond being comprised by a creditor of the said Maxwell, who required the Lord Harries to pay him, as compriser, succeeding.

No 20.
clause in it
inserted for
purposes
merely per-
sonal.

in the said Maxwell's place and right, and thereupon the Lord Harries being charged, who suspended upon the clause in the bond, that requisition was not made by advice of the friends named in the bond, as ought to have been done, and without which he was not subject in payment;---the LORDS found, that seeing this bond was comprised by the creditor of Maxwell, which compriser was become singular successor to her, that he was not subject to that clause, to make a requisition by the consent of these friends, who were adjoined to the personal requisition, which might have been made by that creditor, in case the right of the sum had subsisted and remained with her; for that cause being set down for personal respects to take away the power from the woman, to dispoise or uplift the sum without the advice of these persons, could not go out of her own person to affect the singular successor, and to bind him to seek their concurrence thereto, whereto she was tied; and it was not respected what the suspender answered, that the compriser could not have the right otherwise transmitted to him, than his debtor had the same herself, which being so affected to herself, behoved to remain so to every one claiming her right, otherwise that condition would be elusory, and was unprofitably adjected, for then she might have made one assignee thereto, and so if the condition should not bind every one who should obtain that right, the assignee, albeit to the debtor's own use, might frustrate the meaning of the bond, and, without the friend's advice, lift up the sum, and thereafter restore the same to her, to be used at her pleasure, which were against the intention of the bond; attour that clause is not simply conceived in favours of the creditrix, but it is also introduced in the debtor's favours, who possibly would not have given the bond otherwise, but with this express condition; notwithstanding of all which the requisition and charge thereon was sustained, but the execution was delayed to a term thereafter; against which the debtor might provide to pay the money.

Act. ———.

Alt. *Belbes.*

Clerk, *Hay.*

Fol. Dic. v. 2. p. 63. Durie, p. 514.

1635. December 23.

KEITH and L. GLENKINDIE against IRVIN.

No 21.

Compensation was sustained against an onerous assignee, where the debt existed before the assignation; and was contained in the contract on which the bond assigned depended.

ALEXANDER IRVIN of Fortrie being obliged by contract betwixt him and Patrick Gordon of Kincraigie, to grant to him in his name, but to Patrick Keith's proper use, two bonds, the one of 400 merks, the other of 500; in which contract the said Patrick Keith is also bound to deliver to the said Alexander Irvin certain bolls of victual; according to which contract, the said Alexander Irvin having subscribed the said two bonds to the said Patrick Gordon, wherein no relation was made to the said contract, nor bore to be done to the behoof of the said Patrick, but two pure and simple bonds of borrowed money, to which two

No 21.

bonds the said Patrick Gordon having made Keith and L. Glenkindie assignees, and they charging thereupon the said Alexander Irvin to pay, he suspends upon compensation of the victual owing by the said Patrick Keith to him, conform to the said contract, which was the ground of the bonds whereupon he was now charged, and which compensation, he alleged, ought to be received against these assignees, as it might be received against Keith his debtor, or against Gordon their cedent, who acquired the right of the bonds, albeit in his own name, yet to the behoof of Keith, as was appointed by the contract; and albeit the bonds be pure and simple, and neither make mention that they are given to the behoof of Keith, nor yet depend upon the contract; whereby it was alleged, that this reason of compensation cannot be received against these chargers, who are true creditors to Gordon, and who seeing the bonds in their debtor's name, and to be simple, not affected with any quality or condition, were in *bona fide* to take assignation thereto, and ought not to be prejudged by any other bargain betwixt this suspender and the cedent; likeas they alleged, that the compensation cannot be received against them who are assignees for a true just debt owing to them; and so much the rather, because the debt owing to the suspender by Keith, is only liquidate since they were made assignees, and since their charges executed thereon, and since the time that they obtained protestation against a prior suspension raised in this same matter; notwithstanding of which allegiance, the Lords found the reason of compensation relevant, as well against the assignee as against the cedent, and found it would have militated against the cedent, as if Keith's name had been insert in their bonds, in respect, albeit, the bonds were simply made to Gordon, yet the same behoved to be reputed conform to the contract, to be made to the use of Keith, who was the suspender's debtor; seeing it could not be qualified that there was another cause, whereupon the said bonds were given to Gordon the cedent; and albeit, the debt was liquidated since the charge, yet the compensation was relevant, seeing the debt was existant before the assignation, and was contained in the same contract, which was the ground whereupon the said two bonds depended, as said is.

Act. Nicolson & Davidson.

Alt. Gilmour.

Clerk, Gibson.

Fol. Dic. v. 2. p. 63. Durie, p. 787.

1636. July 21.

KING against DOUGLAS.

No 22.

A liferenter disposed his right to the fiar, taking a back-bond to relieve her of the debt of a former fiar. This found

ONE Janet Douglas relict of James King, being liferenter of a certain sum whereof her son had the right of fee, which Janet disposes to her said son the liferent thereof, and at the very time of the disposition, the same day before the same writer and witnesses, receives a bond from her son, by the which he obliges him to relieve his mother of her Husband's, his father's whole debts, and if he did not, that he should repone her to her own place against

that disposition, and in that case declares her disposition to be void; after which the said son makes Janet King his sister, assignee to a part of the said sum, who pursuing the debtor therefore, the said mother compeared, and alleged that she ought to have her liferent, the sum being provided to her during her lifetime; and the daughter opposing the foresaid disposition of her liferent to her son, and the mother duplying upon the said bond granted by her son, done at the same time, as said is, which being *pactum incontinenti adjectum* must be of force, as if it had been insert in the body of the disposition; likewise she had action of declarator intended upon the back-bond, and her said son knowing that he has failed in the condition of the back-bond, has reponed her; and the daughter answering, that the bond could not work against her, who was a singular successor, and saw a disposition pure and simple, not affected with any such condition, as the back-bond bears; and for the declarator, it is posterior to the right made by her brother to her, and sicklike the disposition is posterior: THE LORDS found the pursuer's summons, and the answers in fortification thereof, relevant, and repelled the allegiance proponed upon the back-bond, which, albeit done at the same time of the disposition, they found could not prejudice this pursuer, who is a singular successor, but only should work against the granter's self; and the action and reposition being after the right made to the pursuer, and intimation thereof were rejected, seeing the condition exprest in the back-bond was not insert in the disposition *in corpore primi juris*.

No 22.
not to affect
a singular suc-
cessor.

Act. ———.

Alt. Heriot.

Fol. Dic v. 2. p. 63. Durie, p. 820.

1663. January 14. JOHN SCOT against MONTGOMERY.

JOHN SCOT, as assignee to certain bonds granted by Montgomery to Andrew Robertson, charges Montgomery, who suspends upon this reason, that he instantly instructs by a back-bond, that the bonds are for the price of certain lands, and by the back-bond it is provided, that these sums should not be paid till the writs of the lands were delivered, and payment made of some duties thereof.

THE LORDS found the back-bond, being before the assignation, relevant against the assignee, albeit the bonds were simple, bearing borrowed money.

Fol. Dic. v. 2. p. 64. Stair, v. 1. p. 156.

No 23.

No 24.

A person having filled up a trustee's name in a blank bond, and taken a backbond of trust, this was found good against the trustee's creditor arresting the sum in the debtor's hands.

1678. February 5. MACKENZIE against WATSON and STUART.

THE Lord Elphinston having granted a bond blank in the creditor's name to Sir William Thomson's relict, she, for the like sum, delivers the bond to Mr Roderick Mackenzie, who being unwilling to distress Elphinston in his own name, fills up the name of Hector Mackenzie, and takes from him a backbond, bearing, that his name was but in trust to Mr Roderick's behoof. John Watson being creditor to Hector, arrests in Elphinston's hand, and pursues to make furthcoming. Mr Roderick compares, and produces the backbond, and *alleges*, That this sum cannot be made furthcoming for Hector's debt, because his name is only borrowed to Mr Roderick's behoof. It was *answered*, That such backbonds can have no effect further than against the granter, but not against his singular successor by assignation or arrestment, otherwise no assignee can be secured; and therefore *jus crediti* is stated in Hector, and his backbond is but a personal obligation to pay or denude, which therefore may have effect against Hector, but not against his singular successor; and this will be an easy way to mar commerce, and cheat assignees, who seeing a clear bond, are in *bona fide* to trust the creditor, or contract with him; and Mr Roderick had a remedy by intimation of the backbond, by which it would have had the effect of an assignation intimated, and thereby have been preferable to a posterior assignee or arrester. It was *replied*, That the common ground of law is, that *nemo plus juris in alium transfert quam ipse habet, et quisque scire debet cum quo contrahit*; and therefore in personal rights singular successors can never be secure against the deeds of their cedents instructed by writs, though their oaths are not receivable against singular successors, and therefore no party, by seeing a clear liquid bond, and contracting *bona fide*, can be further secure, because it is without controversy, that the cedent's discharge before intimation or arrestment, will exclude the assignee or arrester; yea compensation against the cedent, instructed by writ, will exclude them, much more should a backbond relating to the very right itself, which is *pactum ex incontinenti adjectum* is *pars contractus*. It is true, our law, to secure real rights, hath by remedies peculiar to us, cut off the deeds of authors, which are not in the body of infeftments or reversions, ingrossed or registered, but that hath never been attempted or designed in personal rights, nor is the matter now entire that the LORDS would declare they would respect such backbonds, as to singular successors, unless they were expressed or mentioned in the right; for there is now *fixa consuetudo* in the contrary, whereupon all parties think themselves secure by backbonds, as to personal rights, yea as to dispositions before infeftments or apprisings, before the expiring of the legal, as was found in the case of Sir Ludovick Gordon *contra* Skene and Crawford, July 6. 1676, No 1. p. 7167. And there is nothing more ordinary than when apprisings are to be led, many creditors assign their rights to one in whose name the apprising is to be led for all, and takes backbond, that the appriser's

name is instructed to the behoof of the cedent, which hath ever been sustained against all singular successors of the apprising before the legal expire; and though our custom hath required intimation to compleat assignations, yet never to compleat backbonds, restricting or qualifying rights, or declaring the trust for behoof of any party.

THE LORDS found, That the backbond declaring the trust was effectual, not only against the granter, but also against the arrester arresting for the granter's debt, and therefore preferred Mr Roderick Mackenzie to Watson.

Fol. Dic. v. 2. p. 64. Stair, v. 2. p. 607.

No 24.

1705. July 19.

ALEXANDER BLACK, Merchant in Edinburgh, *against* ANDREW SUTHERLAND, Writer to the Signet, and BARBARA GUTHRIE, his Spouse, and other Creditors of PATRICK STEILL, Vintner in Edinburgh.

PATRICK STEIL and Alexander Black being bound to Sir Robert Cheisly, late Provost in Edinburgh, in L. 300 Sterling; and Steill having received from Black for relief of his proportion, a precept for L. 462 Scots, upon Mr Tock, perriwigmaker in the Wrightshouses, and obliged himself by backbond to Black, that he should apply the same for the satisfaction of Sir Robert Cheisly's debt *pro tanto*; Andrew Sutherland, and others of Patrick Steil's creditors, arrested the money in Tock's hand, as belonging to their debtor, and raised a furthercoming; wherein Alexander Black compeared and craved preference to the arresters, although the intimation of his backbond was posterior to their arrestments; in regard Steill had only a personal right to a moveable subject, qualified with a backbond for a specific use, and so upon the matter a trust not affectable for his debts.

Answered, The sum arrested cannot be called Black's money, but Steill's, whose faith Black followed; and therefore Steill's Creditors are preferable, unless there had been a retrocession or intimation of the backbond, prior te their diligences of arrestment; seeing they were not bound to know of a latent backbond.

Replied, By our law backbonds are real and subsist against third parties, February 5. 1678, Mackenzie *contra* Watson and Stewart, *supra*. The like holds in apprisings or adjudications, where many assign their debts to one, that he may adjudge in his name for their behoof, and they get backbonds from him as a trustee, which militate against his successors, and qualify the adjudication led by him within the legal, till it be made real by infestment.

THE LORDS found that Steill's backbond so affected the money, as it could not be arrested for his debt. For they thought a backbond of this nature was *pactum ex incontinenti adjectum*, and *pars contractus*, being of the same date with

No 25.

A bill being indorsed to one upon his giving a backbond to apply the money to a certain use, the backbond was found so to affect the money, as it could not be arrested by the creditors of the indorsee

No 25. the precept; and that Steil's Creditors could have no more right to the sum, than he had himself.

Fol. Dic. v. 2. p. 64. Forbes, p. 28.

*** Fountainhall reports this case :

STEIL and Black being bound to Provost Chiesly in L. 300 Sterling, and Steil charging Black to relieve him of his proportion, Black gave him a precept on Mr Tock, perriwigmaker in Wrightshouses, for L. 462 Scots; and Black took a backbond from Steil, obliging Steil to apply that sum in satisfaction of Provost Chiesly's debt *pro tanto*. Patrick Steil's affairs falling into disorder, Sutherland, and others of his creditors, arrest this sum in Tock's hands, as Steil's money, and pursue a furthcoming; in which action Black compears, and *alleges*, He must be preferred to all Steil's Creditors who had arrested; for though their arrestments were prior to the intimation of his backbond, yet Steil's right was only personal, and on a moveable subject, and qualified by a backbond, and so is a trust on the matter, and not affectable for his debts, being assigned for a specific use of paying Sir Robert Cheisly, and cannot be diverted to any other use. *Answered* for Sutherland, and the other arresters, They were preferable, unless there had either been a retrocession, or intimation of the backbond, prior to their diligence by arrestment, neither of which he could subsume on; and they were not obliged to know Steil's latent backbond, and so it can never be called Black's money, but Steil's, whose faith Black followed, and so must take himself to him. *Replied*, The backbond clearing that Steil was only Black's trustee, for applying the sum in the precept towards extinguishing and paying Black's proportion of the debt due by them to Provost Cheisly, the same can never be reputed Steil's money, so as to be open to his creditors' arrestments; and it is a great mistake to think Steil's backbond is only effectual against the granter, for our law has made them real, and to subsist against third parties, as was expressly decided, 5th February 1678, Mackenzie *contra* Watson and Stewart, *supra*; and the same holds in apprisings or adjudications, where many creditors assign their debts to one in whose name the adjudication is to be led for all their behoofs, and they get backbonds from him as their trustee, and which backbonds militate against the adjudger's singular successors, and qualify the right within the legal, ay till it be real by infestment. THE LORDS found that Steil's backbond affected the money, so as it could not be arrested for his debt. Though our registers are a great security in many cases, yet here they are defective; and it were to be wished, that a register were appointed for such personal backbonds, to certify the lieges thereof, that they may be no longer ensnared by such latent deeds, which may be contrived so as to make it next to impossible for creditors to know. But the LORDS thought a backbond of this nature was *pactum ex incontinenti adjectum*, being of the same date, and so *pars contractus*; and that Steil's Creditors could

have no more right to this sum than he had himself; however there is an inconvenience to purchasers and creditors, which registration would prevent.

Fountainhall, v. 2. p. 285.

No 25.

1710. November 8. MONTEITH against DOUGLAS and LECKIE.

THE Lord Dun probationer reported Monteith against Douglas and Leckie. Kennedy of Culzean being debtor to Captain Andrew Douglas in L. 500 Sterling per bond, the Captain assigns it to Mr Alexander Leckie of Dashers, and takes his back-bond, narrating, that he had received it for paying L. 160 Sterling the Captain owed him; and *quoad* the surplus assigned, he should either retrocess, or refund it, if he received payment of the same. Leckie, upon shewing his assignation, and concealing that he was under back-bond, borrows money from Walter Monteith merchant in London, and others, they relying on the faith of that right, which Monteith causes arrest in Culzean's hand, and pursues a forthcoming, which forces Culzean to suspend, where Captain Douglas compares, and produces Leckie's back-bond of the same date, and before the same witnesses with the assignation, and craves preference, in so far as concerns the remanent above the L. 160 Sterling, wherein Leckie was creditor to him, and was the sole onerous cause of the assignation. *Alleged* for Monteith, and the other creditors of Leckie, That they finding a total assignation of the whole sum in their debtor's person, they could never *per rerum naturam* know of any latent clandestine back-bond contrived betwixt Douglas and him, and which bore *per expressum*, that it was for sums advanced equivalent to those assigned, and not a bare general narrative of onerous causes, which plainly shows a design and contrivance to defraud and ensnare; and that Douglas has been *socius et particeps fraudis*, and *nemo debet lucrari ex suo dolo*; and the Lords have been in use to discourage such sinister practices, as Thomson *contra* Henderson, No 28. p. 4906. where a discharge of a bond of the same date with it, was found not to militate against an onerous assignee, seeing it could admit of no other construction but to have been done *animo decipiendi*; and that famous decision, Street and Jackson *contra* Mason, No 32. p. 4911. where an infeftment given by him to his son, did not hinder their access to affect that estate; and the like was found, Reid against Reid, No 33. p. 4923. *Answered*, All accession of fraud on Captain Douglas's part is denied, and is there any thing more usual than for creditors to assign their debts to one person in order that he may adjudge for them all, to save expenses, and he grants each of them a back-bond; will his creditors pretend the whole sums in the adjudication to be his; *nullo modo*, so it is *juris indubitati*, that personal back-bonds affect personal rights, restricting and qualifying them, ay till they be made real by infeftment, after which the back-bonds have no effect.

No 26.

An assignation qualified with a back-bond of trust to a certain extent, found to give absolute right to the assignee, only to the extent of what he had actually paid.

No 26. against singular successors, but only against the granter ; for, in the first case, it is reputed *pars contractus et pactum ex incontinenti adjectum*, and militates against all assignees, as has been oft found, particularly Gordon and Skeen *contra* Crawford, No 1. p. 7167. ; and Mackenzie against Watson and Stewart, No 24. p. 10188. Stair is also clear in this point, B. 3. T. 1. § 21. ; and Mackenzie, p. 106. And the back-bond has the same legal effect with a compensation, or a discharge against the cedent, which will undoubtedly meet the assignee, and so will the back-bond. THE LORDS preferred Douglas, and found Leckie had no farther interest in the total assignation, except in so far as he was creditor, and that the superplus was Douglas's ; and Leckie's Creditors, by arresting, had no right thereto, neither could it be affected, nor reached for his debts, but still belonged to Douglas, the cedent, and that the back-bond excluded Leckie's singular successors, whether legal or voluntary.

THE LORDS were sensible of the hardship that parties might be circumvened by such latent rights, but the decisions were so pat, there was no remedy. It might deserve either an act of sederunt, or act of Parliament, that back-bonds should be registered within 60 days of their date, which would prevent many mistakes ; whereas, at present, there is nothing but the probity or warrandice of the granter to be relied on.

Fol. Dic. v. 2. p. 49. Fountainhall, v. 2. p. 595.

* * * Forbes reports this case :

CAPTAIN Andrew Douglas having assigned to Mr Alexander Leckie of Dashers, a bond granted to him by Sir Alexander Kennedy of Culzean, and John Kennedy his son, for L. 500 Sterling, upon Mr Leckie granting to the Captain a back-bond, declaring the assignation to be in trust, except as to L. 160 then advanced to him, and obliging himself to hold compt to the Captain for the superplus ; Walter Monteith, upon the faith of his assignation, lent several sums to Leckie, for which he got three bonds, and thereupon raised horning, and arrested in the hands of Culzean as debtor to Leckie, and pursued a furthcoming. Wherein Captain Douglas compearing, craved preference to the superplus debt owing by Culzean over and above the L. 160 ; because, personal bonds and assignations may be qualified and restricted by such back-bond, which are of the same force, as if the granter of the back-bond had granted a discharge, and operates not only against the assignee, but also against his creditors and singular successors, Gordon and Skeen against Crawford, No 1. p. 7167 ; Mackenzie against Watson and Stuart, No 24. p. 10188. Seeing in personal rights, every one ought to know and rely upon the condition and faith of his author ; ' *et nemo potest transferre plus juris in alium quam ipse habet* ; ' which must far more hold in this case, where the assignation and back-bond being of the same date, the latter is understood to be *pars contractus*, and *pactum ex incontinenti adjectum*.

Alleged for Walter Monteith ; The assignation bearing to have been granted for an equivalent sum then advanced, he a trading merchant, was *in bona fide* to trust the assignee, and not obliged to know of any private latent back-bond, industriously granted to tempt and ensnare persons to lend money to Leckie. And the LORDS are in use to discourage such fraudulent practices ; Thomson against Henderson, No 28. p. 4906. ; Jackson against Mason, No 32. p. 4911. ; Reid of Ballochmyle against Reid of Dalvelling, No 33. p. 4923.

Answered for Captain Douglas ; No respect to the inconveniency, that Monteith could not know of the backbond ; seeing the same may be pretended against discharges, or grounds of compensation, which are as latent, and yet affect singular successors.

THE LORDS found, that the back-bond doth restrict, affect and qualify the assignation ; and therefore preferred Captain Douglas.

Forbes, p. 438.

1747. December 9. LADY KINMINITY *against* SIR JOHN GORDON.

GEORGE MURRAY of Polrossy granted an heritable bond to Sir John Gordon of Embo, for 20,000 merks Scots ; whereupon he was infeft 1722, and assigned it to Gordon of Garty, who never compleated his title by infeftment, but, 1729, adjudged the estate for this, and a further debt of 2000 merks, on which neither was he infeft ; but having, 1731, borrowed L. 6000 Scots from Robert Gordon, brother to Sir John, he obliged himself to infeft him in an annualrent, correspondent thereto, out of the said sum of 20,000 merks, assigning him to as much thereof, and of the annualrent due to him therefor, as would satisfy the said annualrent of L. 6000, and this right came into the person of Sir John Gordon, by succession to Robert.

Alexander Sutherland of Kinminity, 1734, purchased from Gordon of Garty, this heritable bond and adjudication, and transferred in trust for himself to Gordon of Bucky, who was infeft, 1737, upon the precept in Sir John Gordon's disposition to Garty.

Mary Sutherland, Lady Kinminity, as executrix to her husband, pursued Sir John Gordon for the rents of part of the estate of Polrossy, which he possessed by tack ; to which he pleaded, a preference in his own right, for that Garty having only a personal right to the heritable bond, when he transferred it to Robert Gordon, this must give a preference to him on those rents which fell due betwixt the date of that deed, and the time when Bucky's posterior disposition was compleated by infeftment ; although it was owned, that agreeably to what was found between Bell of Blackethouse and Gartshore, No 80. p. 2848. Bucky would have been preferable from the date of his infeftment.

No 26.

No 27.

A second assignee to a personal right, which he first completes by infeftment, carries the profits accruing thereon, between the date of his assignation and infeftment.

No 27. Sir John also *pleaded* compensation on a bill of Kinminity's, bearing annual-rent from the date, to the term of payment.

THE LORD ORDINARY, 16th July 1745, " preferred the Lady Kinminity to the tack-duties, which fell under her husband's disposition, and repelled the ground of compensation."

Pleaded in a reclaiming bill; That the right being personal in Garty, the personal conveyance was effectual, and carried the profits, anterior to the time when the subsequent conveyance was made real by infestment.

Answered; That it is infestment which determines the property of lands, and the rents must follow the subject; and granting, if a question had occurred before infestment, the first right must have been preferred, this would have been owing to their being both considered as assignation to mails and duties, where the first diligence would be preferred.

THE LORDS adhered.

Act. *Ferguson.*

Alt. *Lockhart.*

Clerk, *Murray.*

D. Falconer, No 221. p. 305.

1749. *December 14.*

THE INSURANCE COMPANY OF EDINBURGH *against* The ROYAL BANK.

No 28.

By the articles of an insurance Company, the area of a burnt house falls to the Company, if not built within three years after the proprietor receives the insured sum. This article was found not to effect onerous purchasers.

CERTAIN considerable proprietors of houses in Edinburgh, entered into a contract, for mutually insuring each other against losses by fire, by raising a fund for that purpose, by the contribution of certain sums, proportioned to the estimated value of the subjects insured, or by paying certain annuities for a determined number of years; the profits, if any arose, after making up what losses should happen, being to be divided amongst the Society, in manner agreed on by the articles; by the 12th of which it was provided, " That the area or ground right, with the ruins, if rebuilt within the space of three years, should be allowed by the Society to the proprietors *gratis*; and if not rebuilt within the space of three years from the adjustment, and payment of the damage, should belong to the Society, if there were no legal impediment hindering him to build within the said three years."

The contractors obtained a seal of cause from the Magistrates, incorporating them, and many other landlords acceded to the Society, which was done by subscribing their books, and paying the premium, or granting bond in due form, for paying the annuities in lieu thereof; which bonds were, by act of Parliament, declared to be real upon the house insured; and the method upon alienations, was for the purchasers to subscribe, and grant bond if any annuity remained due.

Sir James Dalrymple of Hales, and Mrs Margaret Cathcart, insured their several properties, in that tenement, at the back of the cross, called Carbieston's land, which was consumed by fire; and at the meeting of the Society, 7th De-

December 1741, the loss declared to have been total; in consequence whereof, payment was made of the full estimated value, to wit, to Sir James 16th December 1741, and to Mrs Cathcart, 23d April 1742.

William Adams architect made a purchase of these houses in September 1743; the disposition from Sir James, containing a clause, providing, that in case he failed to build within three years, whereby the area should be evicted, the disponent should not be liable in warrandice; and he conveyed his right to Allan Whitefoord, for the use of the Royal Bank.

Mr Adams had also purchased an adjoining house, which, according to the plan he had formed for the Bank, was necessary; and 6th April 1744, obtained warrant from the Dean of Guild, whereupon he began to remove the rubbish of that other house; and 10th April 1745, obtained jedge and warrant for building; but application was made 1st May, by Elizabeth Hamilton, for stopping him, as having taken into his plan the space of a cellar belonging to her, part of the additional purchase, and there the design stopt.

The Society raised a declarator against Sir James Dalrymple, Mrs Cathcart, Mr Adams, Mr Whitefoord, and the Royal Bank, that the areas belonged to them, for failure of building, at least that they should be adjudged to them, the article implying an obligation to convey; and the Bank took infestment in the subjects.

Answered; Sir James Dalrymple, and Mrs Cathcart, never came under any legal obligation, consequently there can be none incumbent on their successors, in respect their names appear, with numbers of others wrote in a book, to which the articles are indeed prefixed, validly executed by the first contracters, but the subsequent names are added of different dates, without witnesses, and as they do not subscribe together, they are not *co-testes*.

Replied; The parties were bound by their accession to the Society, and their names might have been wrote in the books by any body, they have subscribed the bonds for their annuities, validly executed, referring to the articles, have made payment upon them, and have received the estimated value of their houses.

Answers, 2dly, The article pursued on, proceeds on an erroneous supposal, that the area belonged to the Society, whereas it was still the proprietor's; no more was insured than what was combustible, which the area was not; and the proprietor having right to it, had no need of this article, to give him what was his before.

Replied; It is understood, that houses are insured at their full value, according to which, the Society pays; which implies an obligation on the proprietor to make over the area to them; and this is supposed by the article, whereby the company conditionally pass from their right, and allow it to the former proprietor.

Answered, 3dly, The forfeiture is not incurred of this right, granted to the proprietor, if it is to be called a grant; it cannot be imagined the not

No 28. finishing a building should infer a forfeiture ; and here preparations were made and the work begun, by removing the rubbish, and obtaining the jedge and warrant before lapse of the time. The work also was stopt by a lawful impediment, within a month of the lapse, which ought to be taken into consideration, as this forfeiture is a penal irritancy, and purgeable ; neither ought it to be objected, that both the beginning to work, and the impediment regarded the house taken in as an addition to the plan ; since not to allow of such additions, would be to make it impossible to mend any absurdities in the old buildings, to the prejudice of the beauty and regularity of the place.

Replied ; There is no penalty in the case, the Society pays for the house, but on condition gives the area to the former owner, which not being complied with, it has right to claim it ; if it has been usual to estimate houses below the value, the owner has judged it to be for his advantage to pay a lower annuity ; besides, there is this difference betwixt insurance in this Company, and in any other, that here the insurers and insured are the same, and the conditions cannot be unequal or penal, where the persons at contracting, have an equal chance of loss and gain ; the claim is not made, because the house was not finished, but not begun to be built, nor the ground so much as cleared ; for neither the working on another house, nor impediment given thereto, can be considered ; and this does not hinder the improvement of the plan of a building by a neighbouring purchase, providing it can be made with a clear title.

Answered, 4thly, There can be no claim against the Bank, as the real right was in the original owners, which they have conveyed, and the purchasers are infest.

Replied ; The owners had the right in them, subject to a conditional obligation to denude ; the articles of the Insurance Company were notorious, and no person could *bona fide* accept of a right to defeat them ; especially, the purchaser could not insist against them, with regard to the purchase from Sir James Dalrymple, who excepted from his warrandice, any eviction that might happen upon them. Mr Adams disposed his right while it remained personal, consequently the purchaser from him was liable to the same objections he was, and could not mend himself by taking infestment, after the matter was made litigious.

THE LORDS found, that the Royal Bank had in them the real right to the area, and were not bound to denude in favour of the pursuers, and remitted the cause to be further heard, how far Sir James Dalrymple, and Magdalen Cathcart, the proprietors when the houses were burnt, were liable to the pursuers in damages.

Reporter, *Easdale.* Act. *R. Craigie.* Alt. *W. Grant.* Clerk, *Kirkpatrick.*

D. Falconer, v. 2. No 110. p. 125.

S E C T. IV.

Pactions, Declarations, &c. by Back-bond or otherwise, qualifying real Rights.

1621. December 21. L. BARNBARROW against L. of ISLE.

BARNBARROW pursues removing, upon a comprising from the Laird of Clerie, against the Laird of Isle and his Tenants, for removing from the comprised lands. Isle excepts, that he is heritably infest and confirmed long before the comprising, and by virtue thereof in possession. The pursuer *replies*, That that infestment cannot defend him, because he was denuded thereof in favours of the Duke of Lennox, who thereupon was infest; likeas the Duke was denuded in favours of Culriah, and he infest, and which Culriah concurred, being personally present in this pursuit with the pursuer. It was *duplied*, That his concurrence could not sustain this pursuit upon a warning not made at the concurring's instance, but upon a right of comprising, which was not compatible with the concurring's heritable right, specially seeing, if he were pursuer, he would exclude him, by alleging that he could not be in a better estate, nor the Duke his author, who, if he were pursuer, could not remove the excipient, seeing, at the time when the defender resigned the lands in his favours by his bond, he obliged himself not to remove him while he were paid of 3000 merks addebted to him by the Laird of Clerie, which is not yet paid. It was *answered* by the pursuer, That that was a personal bond, which could not oblige Culriah, if he were pursuer, far less can meet this pursuit, assisted by his concurrence.—THE LORDS repelled the exception, in respect of the reply, and of the concurrence; which concurrence they sustained to make the same warning, at the instance of the compriser, to subsist, without any respect that the compriser had only warned, or that the Duke had given his bond to the excipient, which they found would not bind Culriah, and so the concurrence of the heritor was sustained to make the warning and removing used at another party's instance, not having, or alleging right from the concurring, to subsist.

Act. ———.

Alt. Lawtis.

Clerk, Gibson.

Durie, p. 7.

56 R 2

No 29.

A warning to remove was sustained at a creditor's instance, in consequence of the concurrence of the heritor, although the creditor alleged no right from the concurring.

1629. *March 10.*SHAW *against* KINROSS.

No 30.

A dispoinee to an infeftment; of annualrent granted a back-bond to the disponent, retrocessing the liferent of it. Thereafter he infeft himself in the annualrent right, upon the procuratory of resignation in the disposition. A singular successor was found not obliged to implement the back-bond.

ONE being infeft in an annualrent out of some lands, who disposing that annualrent to another; after which disposition (which contained a procuratory of resignation therein), the acquirer of the disposition, before he was infeft conform thereto, by the superior of the annualrent, who was heritor of the land out of which it was disposed, gives a bond to the disponent, reponing her to her liferent thereof; after which bond, he immediately uses the procuratory of resignation, and was infeft by the superior in the said annualrent, the disponent nevertheless retains the possession; after which, the acquirer of the infeftment, upon the said resignation, resigns the said infeftment, and right of annualrent, in the hands of the heir of the superior and heritor of the lands, who, notwithstanding thereof, is still decerned to pay the annualrent to the said first resignant, conform to the foresaid back-bond made to her; thereafter the right of the land being comprised from the said heritor, and it being questioned, if the land was affected with the burden of that annualrent, and that really the compriser was holden to pay the same as the author was, conform to the foresaid bond; it was found, that the compriser might bruik that land without that burden, which the singular successor was not holden to pay, albeit his debtor, from whom he comprised the land, might be personally, and his heirs subject therein; yet seeing the real right was resigned in the superior's hands, no bond given by the resigner, or acknowledged thereafter by the superior, would affect the land against a singular successor; and, therefore, the person first heritor of the annualrent, by the right of the said back-bond, with continual retention of possession conform thereto, was not found to have any right against the land, or against the singular successor, but only against the heirs of the makers of the bond, and others whom she might personally convene.

Act. Rollock.

Alt. Burnet.

Clerk, Gibson.

Fol. Dic. v. 2. p. 64. Durie, p. 435.

No 31.

A factory granted to intromit with rents for payment of certain debts, was found no real right.

1632. *July 17.*LA. BORTHWICK *against* SCOT.

THE Lady pursuing for the mails and duties of the lands of Cathcum, conform to her conjunct infeftment, after the decease of the Lord Borthwick, her husband; and the defender *alleging*, That her umquhile husband had, for causes most onerous, viz. for satisfying of a debt owing by him to the excipient, granted a power and letters of commission to him, to intromit with the duty of these lands, for payment of these debts, ay and while he were satisfied thereof; and that they were not yet satisfied, and therefore the duties ought to per-

tain to him, and not to the Lady ;—in this process, it being questioned, if this factory could be obtruded against the Lady, who *alleged* the factory not to be a real right, and that it could not be obtruded against her, no more than a right to bruik lands, made to a creditor, to be possessed for payment of an annualrent of money lent, ay and while the money were repaid, could be admitted against a singular successor, as she alleged herself ought to be considered, seeing she alleged that her right flowed not from her husband, but proceeded upon the Earl of Lothian her brother's resignation, who was heritor of the lands, and resigned the same for infeftment alike principally, to be given to my Lord her husband, and to her, and to the longest liver of them ;—and the other party *answering*, that the factory was real, being for a cause so onerous, specially against the Lady, who could not be reputed a stranger, nor singular successor, seeing her infeftment behoved to be reputed to flow from her husband, seeing the Earl of Lothian was obliged to resign in his favours and his heirs, and not in her favours, so that her infeftment behoved to be reputed her husband's deed :—THE LORDS repelled the allegiance ; and found, that this factory was not real, and could not be respected against the Lady, nor her infeftment, which the Lords found ought not to be respected as an infeftment or donation flowing from her husband, seeing she was equally infeft with him, and that he could not revoke the same, not being his own deed.

Act. Nicolson.

Alt. Stuart.

Clerk, Hay.

*Durie, p. 647.*1639. *January 30.* COCKBURN *against* TROTTERS.

No 32.

A MILL being feued, and the author having given a bond apart at the constitution of the feu, binding him to lead the mills-stones when required, on pain of losing a year's feu-duty ; and the singular successor being required, and failing ; the LORDS assolizied him, because this was a bond *extra corpus juris*, and so could not bind a singular successor in the right of the feu.

*Fol. Dic. v. 2. p. 65. Durie.**** This case is No 4. p. 4187. *voce* FEU-DUTIES.1661. *July 6.* TELFER *against* MAXTON.

No 33.

AN appriser infeft having obliged himself to communicate whatever profit should arise to him by his apprising, out of the common debtor's estate, this paction was found not good against a singular successor in the apprising.

*Fol. Dic. v. 2. p. 64. Stair.**** This case is No 18. p. 5631. *voce* HOMOLOGATION.

1664. November 23.

ALEXANDER LIVINGSTON and SHAW of Sornbeg *against* LORD FORRESTER and CREDITORS OF GRANGE.

No 34.

An estate in a party's person under back-bond for certain purposes, was allowed to be adjudged after his death for his debts, under burden of the back-bond.

ALEXANDER LIVINGSTON, as assignee by Mrs Margaret Forrester, and Sornbeg her husband, to some debts owing to her by her father the umquhile Lord Forrester having charged the remanent daughters, and heirs of line, craves adjudication of the estate of Forrester, and barony of Grange, wherein the Lord Forrester died infest. Compearance is made for a creditor of Grange, who produces a back-bond, granted by the Lord Forrester to the Laird of Grange, bearing, that the infestment was in trust to the use and behoof of the Laird of Grange, and only to the Lord Forrester's behoof for relief of debts he should be engaged in for Grange; and *alleged*, That he being Grange's creditor, and now insisting against Grange, who has renounced to be heir, for adjudging of the estate of Grange, for Grange's own debt, he has good interest, in this process, to allege no adjudication of Grange's estate, because it is only in trust, except in so far as may be extended to my Lord Forrester's relief: and, if the pursuer condescend upon any distress or engagement, he will instantly relieve the same. The pursuer *answered*, That he, being now in an anterior diligence to this party, ought not to be stopped in his diligence, but must be admitted to adjudge from the Lord Forrester's Heirs whatever was in his person; and the other party may also proceed, according to his diligence, to adjudge the back-bond; and, when he pursues thereupon, he shall have an answer; *2dly*, There is no reason to stop the adjudication, and to force the pursuer to condescend upon my Lord Forrester's debts or interest, because a creditor cannot possibly know them; and therefore adjudications are always granted, generally of all right the debtor had, and is the only ground upon which the adjudger can pursue the havers of the debtor's rights to exhibit and deliver them, and thereupon to found processes and condescendences, but cannot be urged to condescend before he obtain adjudication; and also insinuated, that he would take his adjudication with the burden of the back-bond; but some of his advocates resiled therefrom.

THE LORDS having considered the case amongst themselves, how dangerous it were, if the creditors, or persons entrusted, obtaining infestment of an entrusted estate, the back-bond of trust being personal, would not exclude them; and albeit the person entrusted were not *solvendo*, as in this case, the entrusted estate, as to the heirs and creditors, would be unavoidably lost:

And some being of opinion, that a personal exception upon a back-bond could not be competent to burden or qualify a real right, or an action for obtaining thereof; but the most part were of opinion, that albeit the right, if it were complete, would be real, yet this action for obtaining thereof is but personal; for real actions are such only which proceed upon real rights, and

against the ground, such as upon annualrents; and therefore this being a personal action, might be excluded or qualified by a personal exception upon the back-bond; and therefore they adjudged with the burden of the back-bond.

Fol. Dic. v. 2. p. 65. Stair, v. 1. p. 232.

* * * Newbyth reports this case:

1664. November 25.—UMQUHILE Grange Hamilton did dispoise the lands of Grange to the umquhile Lord Forrester, who thereupon was infeft; and, at the same time, did grant a back-bond relative to the foresaid disposition, wherein he declares, that the foresaid right was granted to him upon trust, and that the same was for the use and behoof of the Laird of Grange's spouse, and their heirs, he always being satisfied and secured for sicklike sums as he hath already undertaken, or should undertake, for Grange, his weal and standing of his estate, and therefore obliges himself, that he being paid and relieved in manner foresaid, to denude himself, and dispoise the lands in favours of the Laird of Grange, his heirs and assignees. David German, and others of the Laird of Grange's Creditors, upon several debts due to them, comprise the lands of Grange from John Hamilton, now of Grange, as lawfully charged to enter heir to his father in the said estate, and have expressly apprised the back-bond *in anno 1653*; Alexander Livingston, a creditor of the Lord Forrester, pursues an adjudication of the lands of Grange.—THE LORDS sustained the adjudication with the burden of the back-bond, notwithstanding it was *alleged* for David German, and remanent of Grange's Creditors, That any infeftment the Lord Forrester had was only upon trust, and to Grange's behoof, declared in the back-bond, so that the lands of Grange cannot be liable to Forrester's debt, nor be adjudged by the pursuer, especially seeing, David German, and the rest of Grange's Creditors, had comprised the estate for considerable sums of money, and particularly the back-bond, many years before the intending of this pursuit against the executor of the Lord Forrester; and that there is a pursuit depending against them, at their instance, for implementing and denuding, conform to the back-bond; for the LORDS founds that it was not *hujus loci* to debate any thing that might hinder the adjudication upon the back-bond, which was only a personal obligation.

Newbyth, MS. p. 7.

1666. January 31. HUGH DALLAS *against* FRASER of Inveralachie.

SIR MUNGO MURRAY having, by the Earl of Crawford's means, obtained from the King a gift of the ward and marriage, of Fraser of Streichen his nephew, he did assign the gift to Mr James Kennedy, and he to Hugh Dallas, before it past the seals; and, at the time that the gift was past in Exchequer, the same

No 35.
A back-bond
granted at
passing a
gift of ward

No 35.
and marriage,
and register-
ed in the
books of
Exchequer,
found to
affect the gift
in the person
of a singular
successor.

was stopt until Sir Mungo gave a back-bond, bearing, that he had promised, at the obtaining of the gift, to be ruled therein at the Earl of Crawford's discretion, who, by a declaration under his hand, declared that the gift was purchased from the King for the minor's behoof, and that only a gratuity for Sir Mungo's pains was to be paid to him; and that the Earl declared, he allowed Sir Mungo 5000 merks. There was a second gift taken, in the name of Sir William Purves, of the same ward and marriage. Hugh Dallas pursuing declarator of the double avail of the marriage, because there was a suitable match offered, and refused; compearance was made for Sir William Purves, and the Lord Fraser his assignee, who declared that their gift was to Streichen's behoof, and *alleged*, That the first gift could only be declared as to 5000 merks contained in the Earl of Crawford's declaration, because of Sir Mungo's back-bond the time of passing of the gift. It was *answered*, 1st, That Sir Mungo's back-bond, and the Earl of Crawford's declaration, could not pre-judge the pursuer, who was a singular successor to Sir Mungo, especially seeing it is offered to be proven, that the gift was assigned, and intimated before the back-bond; after which, no writ subscribed by the cedent could pre-judge the assignee. It was *answered*, That the said assignation being of the gift, when it was an incomplete right, and only a mandate granted by the King, could not pre-judge the back-bond granted at the time the gift past the Exchequer and seals, for then only it became a complete right; and, notwithstanding of the assignation, behoved to pass in the donatar's cedent's name; so that his back-bond, then granted and registrated in the Exchequer, behoved to affect and restrict the gift, otherways all back-bonds granted to the treasurer and Exchequer might be evacuated by anterior assignations. It was *answered*, That this back-bond was granted to the Earl of Crawford, then but a private person, and hath not the same effect as a bond granted to the treasurer.

THE LORDS Found this back-bond granted at the passing of the gift, and registrated in the books of Exchequer, to affect the said gift, and therefore restricted the declarator thereto.

In this process, it was also *alleged*, That the first gift was null, bearing the gift of the ward and marriage to be given upon the minority of Streichen, and the decease of his father; and the second gift bore, to be upon the minority of Streichen, and the decease of his goodsire, who died last infest, his father never being infest. It was *answered*, That the designation was not to be respected, seeing the thing itself was constant, and that the father's decease, albeit not infest, was the immediate cause of the vacation; seeing the oye could have no interest, until the father, though not infest, were dead.

THE LORDS forbore to decide in this, seeing both parties agreed, that the 5000 merks should be effectual, so that it was needless to decide in this, which, if found relevant, would have taken away the first gift wholly.

Fol. Dic. v. 2. p. 65. Stair, v. 1. p. 345.

* * * Newbyth reports this case :

No 35.

IN a competition betwixt two gifts of the ward and marriage of Simon Fraser of Inverlachie, Sir Mungo Murray being the first donatar, and having granted a back-bond to the Earl of Crawford, obliging himself to be regulated by his Lordship in making use of the said gift, who notwithstanding thereof, did assign the said gift to Mr James Kennedy, without the burden of the said back-bond, and Mr James transferred it to Harry Dallas; who pursuing the tenants for mails and duties; compearance is made for Sir William Purves, as second donatar; who declared, that his gift was for the behoof of the minor, and that Sir Mungo Murray, the first donatar, could not validly assign the gift without the burden of the back-bond, the same being a trust.—THE LORDS found, that the back-bond granted by Sir Mungo Murray to the Earl of Crawford being registrated before the gift passed the seals, did so affect the gift, that it could not be assigned nor transferred, but with the burden of the back-bond, and therefore preferred the second donatar, in regard of the conception of the first gift and back-bond, but with the burden of 5000 merks, which the Earl of Crawford decerned the said Sir Mungo to have from the minor.

Newbyth, MS. p. 54.

1666. July 31. EARL of SOUTHESK against MARQUIS of HUNTLY.

No 36.

EARL of SOUTHESK's cause, mentioned 23d July, No 40. p. 4712. *voce* FORFEITURE, was this day advised, as to another defence, viz. that my Lord Argyle had right to Beaton's apprising of the estate of Huntly, which was long anterior to the pursuer's infestment, and whereunto Huntly hath right, as donatar to Argyle's forfeiture. This contract of the cumulative wadset being granted in anno 1656, it was answered, That Beaton, before he was infest upon that apprising, had renounced all benefit of the apprising, and discharged the same, in so far as it might be prejudicial to the pursuer's right, which is presently instructed. It was answered, That renunciation was but personal, and was never registrated, and so could not be effectual against any singular successor; much less against the King's donatar, having a real right. It was answered, That apprisings are not of the nature of other real rights, but they may be taken away by intromission, payment, or discharge of the appriser, and there needs no resignation nor infestment. It was answered, That albeit, by the act of Parliament 1621, apprisings may be taken away by intromission, and that it hath been extended to payment, yet never to such personal back-bonds.

A back-bond of an appriser, before he was infest, renouncing all benefit of his apprising, and discharging the same, in so far as prejudicial to a third party's right, was found effectual against a singular successor, though never registered.

THE LORDS found the apprising to be taken away by Beaton's back-bond renouncing the same, in so far as concerns this pursuer, and found the same relevant against the donatar. See REGISTRATION.

Fol. Dic. v. 2. p. 64. Stair, v. 1. p. 402.

No 37.

1668. *January 8.* MARGARET FORBES *against* ———.

MARGARET FORBES having granted a tack of her liferent-lands to ———, bearing expressly for payment of such a sum of money, and bearing to endure for 19 years; she did receive a back-bond of that same date, bearing, that so soon as the sum was paid, the tack should become void. The tack coming to a singular successor, she pursues him for count and reckoning, and removing, and insists upon the tenor of the tack and back-bond. It was *alleged* for the defender, That the back-bond did not militate against him, being a singular successor, neither being registrated nor intimated to him before his right, in respect the tack is a real right, and no obligation or provision of the tacksman can prejudge a singular successor.

THE LORDS repelled the defence, and sustained process against the defender, in respect of the tack and back-bond.

Fol. Dic. v. 4. p. 65. Stair, v. 1. p. 500.

No 38.

A back-bond under a superior's hand declared, that the vassal should have liberty to renounce his feu-right when he pleased. This found effectual against a singular successor in the superiority, it being of the same date with the feu-contract, and relating to a matter intrinsic in the nature of the feu.

1669. *February 12.* JOHN BROWN *against* ROBERT SIBBALD.

JOHN BROWN having taken a feu of some acres of land, at a great rent in victual and money, pursues Robert Sibbald (now his superior) to hear and see it found and declared, that he might renounce and be free of the feu-duty. The defender *alleged* absolutor, because this feu was by a mutual contract, by which the vassal had bound him and his heirs to pay the feu-duty yearly, and which obligation he could not loose at his pleasure; for albeit feus which are proper and gratuitously given without any obligation on the vassal's part, but given by a charter, or disposition, as being presumed to be *in favorem* of the vassal, he might renounce the same, *nam cuius licet favori pro se introducto renunciare*; but here the vassal being expressly obliged for the feu-duty, cannot take off his own obligation, this case being like unto that of a tack, which being by mutual contract, cannot be renounced, though by a tack only granted and subscribed by the setter it may. The pursuer *answered*, That he opposed the common opinion of all feudists, *de feudo refutando*, wherein there is no exception, whether the feudal contract be subscribed by both parties; for every contract must necessarily import the consent of both parties, and the acceptance of a vassal to a feu by way of disposition is all one with his express obligation in a mutual contract. 2do, Though such a contract could not be renounced, yet this pursuer may renounce, because by a back-bond by the superior, who granted the feu under his hand, he has liberty to renounce when he pleases. The defender *answered*, That this back-bond not being *in corpore juris*, nor any part of the investiture, it was personal against that superior who granted the same, but not against the defender, who is a singular successor. It was

answered, That the mutual contract not being *de natura feudi*, but at most importing an obligation not to renounce the feu, any personal deed before this superior's right, under the hand of his author, is relevant against him, as well as his author. No 38.

THE LORDS found the allegiances upon the back-bond relevant against the superior, though singular successor, it being granted of the same date with the feudal contract, and relating to a matter extrinsic to the nature of the feu; and so suffered the pursuer to renounce the same.

Fol. Dic. v. 2. p. 65. Stair, v. 1. p. 604.

* * * Gosford reports this case :

IN a declarator pursued at Sibbald's instance against Brown, who had acquired the right of superiority of some acres of land which were holden feu, to hear and see it found and declared, that he being willing to resign the right of the said lands, ought to be free of the feu-duty in all time coming; the LORDS sustained the declarator, in respect that the lands were *ab initio* given in feu for the full duty thereof, and that the feu-duty being 20 bolls of bear, and converted to 10 merks the boll, the vassal had a liberty when he pleased to pass from the conversion; notwithstanding it was alleged that *refutatio emphyteusis* could not be sustained in law, it being *perpetua locatio et non feudum*.

Gosford, MS. No 114. p. 42.

1670. July 12. KENNEDY against CUNNINGHAM and WALLACE.

THERE being an apprising of the lands of Garleith, belonging to John Kennedy, at the instance of Edward Wallace; the said Edward by his back-bond declared that the apprising was to the behoof of William Wallace of Burnbank his brother, and obliges him to denude himself thereof in his favours; thereafter the said Edward assigns the comprising, and disposes the lands to Adam Cunningham, who stands infest; and in a debate for the interest of this apprising, it was *alleged*, That Edward Wallace the appriser having by his back-bond declared, that the apprising was to William his brother's behoof, conform to his back-bond produced, the said William was satisfied by payment or intromission, so that the apprising is extinct. It was *answered* for Cunningham, That the allegiance is not relevant against him, who stands infest as a singular successor, so that his real right cannot be taken away by any personal back-bond granted by his author, whereby he was not denuded; for though his author had granted assignation to the apprising, if it had not been intimated, a posterior assignation intimated, much more a disposition and infestment, would be preferred

No 39.

A back-bond of trust found to qualify an apprising deduced by the trustee, and conveyed by him before infestment to a singular successor, who was thereafter infest, so as to found an exception to the debtor, that the apprising was extinguished by payment made to the entruster.

No 39. thereto; for albeit satisfaction of an apprising, by intromission with the mails and duties be sufficient to extinguish, even against a singular successor, though there was no resignation made, which the Lords had extended to any payment made by the debtor; yet this was never extended to any personal declaration of trust, or obligation to denude, which cannot be valid against a singular successor. It was *answered* for Kennedy, That apprisings and infeftments thereon, do differ from other infeftments, in this, that they require no resignation or re-sasine to extinguish them, but whatever may take away a personal right, either by intromission, payment, or compensation, will take them away even by exception; and what is relevant against the author, is relevant against the singular successor, except as to the manner of probation, that it cannot be proven by the author's oath, but by writ or witnesses; neither is there any odds as to this, whether there be infeftment on the apprising or not; so then if Cunningham were but assignee to the decret of apprising, it would be relevant against him, that before his assignation his cedent had declared that the apprising was to the behoof of another, to whom the debtor had made payment; which declaration being instructed by writ anterior to the assignation, is valid against Cunningham the assignee, and whether he be infeft on this assignation and disposition of the apprising or not, as to this point, law and custom makes no difference, neither doth the case quadrate with an assignation unintimated, competing with a posterior assignation intimated, which might be preferred; but if the debtor made payment to the assignee, though he had not intimated it, it would extinguish the apprising, and no posterior assignation, though intimated, would make the debtor pay again; and in this case there is a real declaration of trust, which is most ordinary, when parties having small sums, assign them all to one who compriseth for all, and by several back-bonds, declares, that the apprising is to the behoof of the several creditors according to their sums, who have always rested therein, and have sought no further; and if this back-bond were not sufficient against singular successors, the appriser might at any time thereafter dispoise and clearly exclude them.

THE LORDS found that the back-bond was relevant against singular successors, and that payment made to him, to whose behoof the apprising was deduced, was sufficient against a singular successor, having right to the apprising, or lands from the appriser, after he granted his back-bond. See REGISTRATION.

Fol. Dic. v. 2. p. 64. Stair, v. 1. p. 692.

. Gosford reports this case :

IN a reduction and declarator at the instance of Kennedy of Barleith against William Wallace of Burnbank, and Cunningham, to whom he disposed his right, upon this reason, that Wallace having been cautioner to Wallace of Carnhill for the pursuer, for the sum of 2500 merks, for relief of which cautionry, the pursuer had disposed to him a wadset of a part of his lands, which he did possess several years, the intromission of the rents whereof did extend to the whole sums for which,

he was cautioner, and wherewith he did satisfy the cautioner ; and yet notwithstanding he did take an assignation to the bond, in name of his own brother Edward Wallace, and did comprise both the wadset lands, and all other lands belonging to the pursuer, and caused his brother dispoise the same to Cunningham, long after a back-bond granted by his brother to him, whereby he was obliged to denude in his favours ; and therefore craved, that the debt contained both in the wadset and apprising might be reduced and declared null. It was *answered* for Cunningham, That he being a singular successor, and having acquired a right to the comprising from Edward Wallace, who stood heritably infeft in the said lands, any back-bond granted by the said Edward, being but personal, could not denude himself of his heritable infeftment, nor prejudice him, seeing he was not obliged to know the same, it being a private latent deed. It was *replied*, That a comprising is of that nature, that by our law it is extinguished by intromission, or a discharge, or by a back-bond, or declaration of trust, which are all but private deeds ; a singular successor, albeit *bona fide* he be infeft upon the comprisinger's right, can be in no better condition than his author. THE LORDS having considered this case as being of a general concernment, sustained the pursuit founded upon the back-bond, and the cautioner's intromission, upon these reasons ; *imo*, That there was nothing more ordinary, than that many creditors were in use to lead a comprising in the name of a person upon back-bonds, or a declaration of trust, which did secure them against all deeds done thereafter by the person entrusted, in respect of the nature of a comprising, which might be extinguished by a discharge or intromission ; so that if this ground were taken away, then there would be a necessity, that every creditor, albeit for a small and inconsiderable sum, should comprise in his own name, and be infeft, otherways the person entrusted might prejudice him of his debt, or should be forced to cause him resign and infeft him, least he should dispoise to another, or, by serving inhibition and raising of a reduction, should secure his interest ; which would hinder all persons to accept of a trust ; *2do*, By our law and practice, comprising is found to be such rights, that albeit infeftment follow, yet they may be extinguished by a discharge of the sums for which comprising is led, and in that they are different from rights of wadset, annualrents, or infeftments ; for these are securities that cannot be taken away by personal rights, but by renunciations and resignations, whereupon infeftment follows. The reason of which difference is, that comprising is but legal diligences, and infeftments taken thereupon are consequential to a decree given by a messenger decerning lands, albeit of never so great value, to belong to a creditor for a small inconsiderable sum, which being truly satisfied or discharged, is in law most unfavourable, and so may be extinguished in a singular manner ; whereas infeftments upon wadsets and other real securities, are founded upon contracts and dispositions subscribed by the parties themselves, bearing procuratories and precepts to denude the granter *omni habili modo*, and to seek the real right in the person of the creditor, and therefore cannot be divested but in that same

No 39.

manner that the law allows. But if the case had been where a compriser having comprised for his own proper debt, and were infeft, and granted only a personal right by assignation, or a bond to denude, whereupon nothing followed, if, thereafter, a singular successor had acquired a real right, or had intimated a second assignation before the first assignee, in that case, posterior rights would be preferred, as being first complete; and the reason is, because, where a person's name is only entrusted, and gives a back-bond, and during the trust, suffers the true creditor to possess until the debt be satisfied, in that case, the law doth extinguish, and makes as if it were transferred in the person of the creditor, who did make use of his name, if the back-bond or declaration of trust was before his infeftment, it being then only a personal right; but if the back-bond or declaration be only granted after infeftment, the question would be more difficult where a third party acquires a valid right; and yet it seems that the decision will be alike in both cases, if it be made truly to appear, that the compriser's name was only borrowed from the beginning, and that he did declare so much under his hand before any right made to a third person, in respect that a right of comprising is singular of its own nature, and different from other real securities, as said is; and that, in our law and practice, it was never otherways found; whereas, if it were otherways, it would open a door to many indirect contrivances, and occasion vast charges and expenses for payment of a yearly duty by every petty compriser to the superior.

Gosford, MS. No 300. p. 129.

1672. November 20.

WORKMAN against CRAWFORD.

No 40.

A back-bond of trust is not effectual against a singular successor, by infeftment in lands, unless he either knew of the back-bond, or paid no money for the purchase.

GEORGE WORKMAN pursues reduction of a disposition and infeftment granted by James Stirling to John Crawford, on this reason, that he having disposed the tenements in question to James Stirling, he gave him a back-bond of the same date, obliging himself to denude, being paid of the sums due to him, and yet Stirling contrary to his trust, had disposed the lands to Crawford; likewise the pursuer had declared the trust against Stirling, and had reduced his right, and therefore Crawford's right from Stirling behoved to fall in consequence. It was answered for Crawford, That long before any declarator against Stirling, he had acquired Stirling's right *bona fide* for onerous causes, and was not called to the declarator against Stirling; and albeit Stirling's back-bond was sufficient against himself, yet being but a personal obligation, not contained in the infeftment, it could have no effect against a singular successor being infeft.

THE LORDS found the defence relevant, unless it were replied that Crawford's right was without an onerous cause, or that he knew of Stirling's back-bond, when he received the right and so was partaker of the fraud.

Fol. Dic. v. 2. p. 65. Stair, v. 2. p. 121.

1673. November 21.

BROWN against GAIRNS.

JOHN BROWN having assigned a bond to Alexander Brown, that he might apprise thereupon with his own sums for John Brown's behoof, Alexander Brown gave a back-bond, bearing 'the apprising as to that sum to be to John Brown's behoof, and obliged him to denude in favour of John Brown as to that sum.' Thereafter Gairns having appraised the same lands, there is a contract betwixt him and Alexander Brown, whereby Alexander restricts the apprising to a part of the lands, and renounceth the rest in favour of Gairns, who assigned his apprising to a third party.—In the competition of the rights, it was *alleged* for John Brown, that he ought to come in *pari passu* with Gairn's assignees in the whole lands, in respect of the back-bond, declaring 'the apprising to be his behoof.'—It was *answered* for the assignee, That he having acquired right from Alexander Brown the appriser, by the restriction of the back-bond could not operate against him, being but a personal obligation, which could not affect an apprising which was a real right.—It was *replied*, That an apprising before infeftment, or the legal expire, might be qualified or affected with a personal obligation, as well as by intromission or a discharge, albeit they could not be known to the assignee, who taking right within the legal, behoved to take it with hazard, especially seeing inhibition was used upon the back-bond before the restriction.—It was *duplied*, That the inhibition did only operate by way of reduction, and not by reply.

THE LORDS found, That the back-bond was sufficient to affect the apprising being before infeftment, and before the restriction, and therefore brought in John Brown *pari passu*, notwithstanding of the restriction.

Fol. Dic. v. 2. p. 64. Stair, v. 2. p. 231.

. Gosford reports this case :

MR JOHN DICKSON having inteded an action for mails and duties against the Tenants of the lands of Urie, as **having right by** assignation to a back-bond granted by Alexander Brown to John Brown, bearing that the said Alexander, being to lead a comprising of the said lands, not only for the sums due to himself by the heritor, but likewise for the sums due to the said John Brown, who was another creditor for which his name was only entrusted, and therefor, by his back-bond, did oblige himself to denude himself, and dispoene a part of the lands comprised in favour of the said John ;—in this action compearance was made for John Gairns, as being infeft in the said lands upon a prior comprising, who *alleged*, That he ought to be preferred, because the said Alexander being infeft upon a second comprising, had transacted and restricted his right to a particular parcel of the said lands, so that any back-bond, albeit prior to the restriction, yet being but a personal right, and a latent deed, could not hinder the

No 41.

A back-bond of trust granted by an appriser, was found to affect the apprising against singular successors, there being no infeftment in this case.

No 41.

first compriser to transact and affect his right by the said restriction, seeing the said Alexander was not thereby denuded of any public right by his comprising, it not being *habilis modus* to take away a right of comprising, whereupon the compriser was infeft. It was *answered*, That a comprising of lands being of a far different nature from an heritable and irredeemable disposition whereupon infeftment followed, and by the law and constant practice, may be extinguished by intromission, or a naked discharge of the whole or any part of the principal sum *pro tanto*; and therefore, by a back-bond, declaring the trust which was granted before any infeftment or comprising led, especially in this case, where the back-bond was of that same date of the assignation, and that the comprising was only a right of reversion of a prior comprising, which was transmissible by assignation, and upon which back-bond the granter was charged with horning and inhibition, served before the granting of the restriction, whereupon the allegation is founded:—THE LORDS having considered the case without respect to the inhibition and horning, which could only be the ground of the reduction, found, That a comprising within the legal was such a right as might be extinguished by private deeds, such as discharges or intromissions, with as much of the mails and duties as would amount to the sum contained in the comprising, and thereupon a back-bond granted by the compriser, bearing a trust, before leading of the comprising or any infeftment, was sufficient to denude or qualify his right against a singular successor, as hath been found by the constant practice; when a private discharge was alleged upon; especially considering, that if it were otherways there would be an absolute necessity that every creditor, albeit for never so small a sum, behoved to lead a several comprising, to the ruin of the common debtor, and would open a door to those whose names were entrusted, to defraud all other creditors, against their own back-bonds and declarations, which hath always been looked upon as a perfect security; and it was so decided *in terminis*, the 12th of July 1675, Kennedy against Cunningham, No 39. p. 10205.

Gosford, MS. No 634. p. 367.

1676. July 6.

GORDON *against* SKENE and CRAWFORD.

No 42.

AN assignee to a decree of apprising, granted a back-bond, obliging him to denude upon payment of a certain sum. This found good against an onerous assignee, the legal being still current, and no infeftment upon the apprising.

Fol. Dic. v. 2. p. 64. Gosford. Stair.

*** This case is No 1. p. 7167. *voce* INTIMATION.

1680. February 5.

RAE against FINLAYSON.

JOHN RAE having bought a tenement in Leith from David Aikman, pursues the tenants for mails and duties, who *alleged* absolvitor, because he had a tack for nine years from David Aikman for L. 36 yearly of tack-duty ; and bearing this clause, ' That he should repair the tenement which then was ruinous, and ' should retain the expenses of reparation, and if it exceeded the tack-duty, ' the setter was obliged to pay him,' and offered to prove that he had necessarily and profitably expended the whole tack-duty in his nine years tack ; and seeing by act of Parliament it is declared, that purchasers shall not break tenants' tacks, they are thereby become real rights, effectual against singular successors, as was found in the case of Oliphant against Currie, 11th December 1677, *voce* TACK ; where Charles being infest upon apprising of the lands of Mordington, pursues the tenants for mails and duties, and Currie defending upon a tack, being 1300 merks of tack-duty, relief of teind, and two dozen of capons, with a clause of allowance of the Provost's annualrent, which exhausted the tack-duty, except the capons and relief ; this tack was sustained against Charles the singular successor ; and the allowance of reparation ought much more to be effectual ; *2do*, The necessary reparations being profitable, both to seller and buyer, both must be liable therefor, though there were no clause of retention in the tack.—The pursuer *answered*, That it is clear by the tack, that the clause of retention, and repetition of the excresce is annual ; for if thereupon the tenant had pursued for the reparation of the first year, which was greatest, he could certainly have recovered the exccress above the rent, and the setter could not defend himself, that the tenant behaved to accept of the subsequent tack-duties, in which he had allowance by the tack, there being no such clause in the tack, and therefore this clause is merely personal and annual, and so it is not effectual against a singular successor ; nor is it like to Currie's case ; for there, ' by the tenor of the tack there remained a yearly duty, payable to ' the setter, over above the allowance of the tenant's annualrent, and if the ' tack-duty had been but a plack, upon consideration that the annualrent was ' yearly to be discharged, the tack would have been effectual ;' but here the retention is indefinite, and exhausts the whole tack-duty, contrary to the act of Parliament founded on, bearing, ' That the buyer shall not break the tenants' ' tack, they paying such like duty to the buyer as to the seller.' As to the second, neither the building nor repairing of houses, though never so necessary, infers any real right or hypothec upon the house ; though that hypothec was constituted by the common law, but is rejected by our custom ; and as there was no *debitum reale* upon the house, much less can there be *debitum personale* upon the buyer, who hath no profit by the reparation, seeing he bought the house, as it was worth when repaired.

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No 43.

Reparation by a tenant found not to affect a singular successor, tho' provided to be allowed in the tack.

No 43.

THE LORDS repelled the defence upon the clause in the tack, and found the clause to be personal, and not effectual against a singular successor, purchasing *bona fide* for a just price: But if the buyer took assignation to the tack, or knew thereof the time of the bargain, the LORDS allowed the parties to be heard upon that point: But seeing tacks are not ordinary in tenements within burgh, as in lands in the country, they found the buyer not obliged to enquire, whether the tenants had tacks, or what they were.

Fol. Dic. v. 2. p. 66. Stair, v. 2. p. 751.

* * * Fountainhall reports the same case:

In a case John Rae against James Finlayson, the following point was debated. There is a tack set in April *per verba de presenti*, (the tacksman having been in the natural possession as a tenant before,) the entry of the tack is suspended till the separation of the corns from the ground. In July thereafter, which is before the entry of the tack, there intervenes an infeftment on a comprising, or a disposition; *Quær.* Whether this will be preferred to the tack or not? If the tack were a consummate tack before the infeftment, by attaining possession it would be preferable; but here is difficulty, that though he be in possession before the said infeftment, yet it is not by virtue of the said tack. The said tack bore also this clause, that in regard the houses set were ruinous, therefore it should be lawful for the tacksman to repair them, though the reparations exceeded the tack-duty for many years, and he should have retention of his tack-duty till he were reimbursed of his meliorations: *De facto* he wares seven years tack-duty on them. Thereafter, this tack-duty is apprised from the setter, and the appriser pursues for the tack-duty of these seven years. The tacksman opposes the express quality of the tack.—It is *replied*, That clause is only personal against the setter.—*Duplied*, It is real and incorporated with the tack.—*Triplied*, A clause in a tack to possess ay and until a sum be paid is not real, neither doth it defend against a singular successor; *ergo*, neither will this clause. Many thought it only personal. See TACK.

Fountainhall, v. 1. p. 95.

1685. *January.*

SINCLAIR against SINCLAIR.

No 44.

AN appriser having restricted his apprising to certain lands, and the restriction being objected to a singular successor infeft upon the apprising; found, That if infeftment had followed upon the apprising before restriction, the restriction was but personal; but if it preceded infeftment, it did affect and regulate the apprising against the singular successor, because, till infeftment, the apprising was transmissible by assignation.

Fol. Dic. v. 2. p. 64. Harcarse.

* * * This case is No 62. p. 5324. *voce* HEIR APPARENT.

1702. November 14.

JAMES ANDERSON against SIR JOHN DEMPSTER of Pitlever, and DUDGEON in Inverkeithing.

SIR JOHN being elected commissioner for representing that burgh of Inverkeithing in the Parliament 1681, to capacitate him for that office, one Anderson, a burgess, disposes to him a tenement of land, whereon Sir John is infeft; but Anderson continues in the possession all the days of his lifetime. His relict, after his death, marries one called Dudgeon, and they enter into a transaction with Sir John Dempster, whereby, for L. 1000 Scots, he disposes the tenement over to them. Upon this, Anderson's heir raises a declarator and reduction, that the right given to Sir John was in trust to the particular end and effect above-mentioned, and therefore craves the right made by Sir John to Dudgeon to be reduced, and fall in consequence. And the LORDS having ordained Sir John to be examined upon the onerous cause of his disposition, he very ingenuously depones, that he paid nothing for it, but got it on the consideration foresaid, to put him in a condition to be their Parliament man, and that no backbond nor declaration of trust was required of him; and it being argued, That his transmission and conveyance to Dudgeon must fall in consequence, the LORDS found, That Dudgeon having acquired it by an onerous title, equivalent to the value of the house, the trust in Sir John's person could not affect his right, it not being a *vitium reale*, and that Sir John his cedent and author's oath could not prejudice him, unless it could be qualified that Dudgeon was *consciis fraudis*, or knew of the trust; but they inclined to think Sir John would be liable, both in respect of his own acknowledgment that the disposition was given him on the account foresaid, and that *nemo præsumitur donare vel suum perdere*; and the *natura negotii* seemed plain that a gift was not here designed, especially being *retenta possessione* by the disponent all his lifetime; but the summons being rather a reduction of Dudgeon's right than a declarator of trust, they assailed Dudgeon from the reduction; but allowed Sir John to be further heard as to any personal conclusion of trust or damage against him for contravening the said trust.

Fol. Dic. v. 2. p. 65. Fountainhall, v. 2. p. 159.

1715. July 14. BRUGH of Finmouth against FORBES of Ballogie.

SIR DAVID THOIRS having acquired the lands of Wester-Lochgellie from William Malcolm; he, without being infeft, assigns the same to Sir Robert Forbes, who granted backbond, acknowledging he had paid no price, but that the right was granted to him, in order that he might sell the lands for relieving himself of what debts he had paid for Sir David, or should thereafter pay; and

No 45.

A party, who was in fact only a trustee, disposed a subject. Found, that the trust could not affect the purchaser's right, not being *vitium reale*.

No 46.

A trustee in a disposition to lands, in order to sell them, gave a backbond to the disponent to account for

No 46.
the price.
The Lords,
in a competi-
tion betwixt
the trustees
creditors, and
those of the
disponer, pre-
ferred the
latter, altho'
the disponer
was never in-
feft.

therefore obliged himself, that being so relieved, he should be accountable, and apply the balance to Sir David, his heirs, &c. And the backbond bears also, That Sir Robert should sell with consent of Sir David or William Thoirs, his nephew. David Brugh being creditor to Sir David, constituted the same by a decret against his heir, and thereupon adjudged the lands and the foresaid backbond; Sir Robert made over his right to Mr Henry Scrimzour, who obtained himself infeft, and there being a part of the price yet in his hands, there falls out a competition about it, betwixt Brugh as creditor to Sir David, and Ballogie as creditor to Sir Robert, who as such, had arrested in Mr Scrimzour's hands.

And it was *alleged* for Ballogie, That in a former debate betwixt Mr Henry Scrimzour and David Brugh, wherein David had alleged the backbond granted by Sir Robert to Sir David did intrinsically affect Sir Robert's right, that Mr Scrimzour could not acquire any right but with the burden of his author's backbond; yet the LORDS preferred Mr Scrimzour; and therefore Sir Robert's creditor arresting in Mr Scrimzour's hands is preferable for the price due to Sir Robert, which could not be affected by his backbond, but Sir David's Creditors must insist for implement thereof against Sir Robert as accords.

Answered for David Brugh, That though Mr Scrimzour was preferred, yet there was not the same reason for preferring Sir Robert's creditor; for the reason of Mr Scrimzour's preference was, his being purchaser *bona fide* from Sir Robert, and had compleated his right by charter, &c. so that the backbond could not affect him; but Sir Robert's creditor, who had only arrested the subject, can never be in better case than himself, who by his backbond, was to apply the superplus to Sir David. The reason is, that it is hard to tie purchasers who pay an adequate price, by backbonds that may be latent; but arresters and adjudgers only affect the subject as their debtor has it in his person, with its qualities; and therefore can never be in a better case than he himself. And this was so decided, 5th February 1678, Mackenzie *contra* Watson and Stuart, No 24. p. 10188. which was indeed a case of bonds for debt, but the reason of the decision hold likewise here. But there was a decision *in terminis*, 22d December 1680, Prince *contra* Pallat, No 39. p. 4932. which was under the Lords' consideration, when very lately they decided in the same manner, viz. 18th January and 4th February 1715, Simson's Creditors *contra* Maxwell, No 40. p. 4934.

Replied for Ballogie, That this was not a backbond of trust, but an obligation upon Sir Robert to pay the superplus price, just as if Sir Robert had given a bond to Sir David for the price.

Duplied for Brugh, That the backbond is granted of the date of the disposition, and Sir Robert bound to sell the lands, and apply the superplus to Sir David; now he does sell to Mr Scrimzour, and lying under an obligation to make the price furthcoming to Sir David, it is impossible Sir Robert's Creditors

could affect this price to Sir David's prejudice; for whatever objection meets Sir Robert, must meet his creditors' arresters.

No 46.

THE LORDS found, That Sir Robert Forbes was trustee to Sir David Thoirs by his backbond, in so far as concerned [the superplus price of the lands disposed, over and above the payment and relief of debts and engagements, wherein Sir Robert was concerned with Sir David, and therefore found Finmouth ought to be preferred to Ballogie, as arrester.

Clerk, *Mackenzie*.

Fol. Dic. v. 2. p. 65. Bruce, v. 1. No 118. p. 148.

1715. July 20.

M'CUBBINS, Heirs-Portioners to DAVID M'CUBBIN, Younger of Knockdolian, against MARGARET FERGUSON.

ADAM of Glentig granted an heritable bond of 1600 merks to the said David M'Cubbin, and granted other bonds to Fergus M'Cubbin, his father, and both father and son assigned their bonds to William Baird, (who was likewise a creditor to Glentig) to the effect that he might lead an adjudication for all; and Baird granted a backbond of trust, and accordingly an adjudication was led.

No 47.
A backbond granted by a trustee not good against a singular successor by infestment.

Margaret Ferguson obtains a bond of 1200 merks from the said William Baird; and, of the same date, for the more sure payment of the said sum, he assigns and transfers the said heritable bond of 1600 merks, to which he had right by assignation from David M'Cubbin; and Margaret Ferguson obtains herself infest, as having right by progress to the precept of sasine contained in the said heritable bond.

In a competition of the Creditors of Glentig, the heirs-portioners of David M'Cubbin craved preference for the annualrent of the said 1600 merks; because, albeit Margaret Ferguson had obtained herself infest as assignee to the precept of sasine, yet William Baird, the granter of the assignation, was a trustee, and his right affected with a backbond, which could not be prejudged by his assignation to Margaret Ferguson; because, when the backbond was granted, no infestment had followed on the heritable bond; and backbonds qualify all personal rights, as apprisings within the legal, even though infestment had followed; and infestments of annualrent may be pleaded to be also so qualified, but much more so while they remain personal rights.

It was answered for Margaret Ferguson, That she ought to be preferred, because the heritable bond was only rendered a real right by her obtaining infestment upon the precept; and a backbond was never found to qualify an infestment of annualrent. And there is no parallel betwixt an apprising and an annualrent; because an apprising is a diligence for obtaining payment; and

No 47. apprisers, in many cases, are bound for diligence ; and all purchasers acquire with the hazard of what may be objected against their authors. The real right of annualrent is only for security of the interest, and which is not destined for extinguishing the principal sum.

2do, There is a great difference betwixt the case of a person purchasing the right of an annualrent, or indeed any other right *bona fide*, relying upon that purchase as the security of their money, and the case of a creditor who, finding the right of annualrent in the person of his debtor, affects the same for security of his debt, but advances no money in contemplation of that right. In which last case, the user of diligence *utitur jure auctoris*, and carries the right under the exceptions that were competent against his debtor. But where a party *bona fide* purchases and pays his money for the purchase, there is much more favour allowed in equity ; and, in like manner, purchasers of appraised lands *bona fide*, for just and equitable causes, have always been considered in other circumstances than the apprisers themselves, bruiking by virtue of their diligence.

“ THE LORDS preferred Margaret Ferguson, as having lent her money on the faith of Glentig’s heritable bond.”

. The above decision is drawn out at the end of the Manuscript more fully, as follows :

In the competition betwixt these parties, about an heritable bond, granted by John Adam of Glentig, to David M’Cubbin, younger of Knockdolian, the right produced for either party stood thus: Knockdolian the creditor, April 1699, assigned the bond to William Baird of Sallochan in trust, to the effect he might lead an adjudication thereupon, together with several other debts ; and Baird grants a backbond, of the same date with the assignation, declaring the trust in ample form. Upon this heritable bond and backbond, Knockdolian, the original creditor, his heirs-portioners competed. On the other hand, Margaret Ferguson produced a translation from the said William Baird the assignee, dated March 1701, whereupon she was infeft, and thereupon craved preference. After several other debates, this question was stated by Margaret Ferguson, How far the backbond or declaration of trust, granted by Baird the assignee to Knockdolian his cedent, could be effectual against Margaret Ferguson, a singular successor by translation from Baird, and who stands infeft upon this translation in Glentig the original debtor’s lands ?

It was *pleaded* for Margaret Ferguson, That Baird having disposed the fore-annualrent to her, no backbond of his can affect her, a *bona fide* singular successor, for an onerous cause, standing infeft ; and that, 1st, From the nature of the thing ; 2d, From the particular constitution of our law requiring registration.

As to the *first*, It was urged as a principle, That an assignation to a precept of sasine transmits to the assignee all the right that was in the cedent ; so that there remains nothing in his person, more than the precept had been directly granted by the proprietor to the assignee ; whence it was concluded, that a backbond granted by the cedent (which in its nature is merely a personal right) may indeed create a good action against himself, but can never affect a right that is no longer in his person. A backbond by an assignee to a personal bond will indeed affect his singular successor ; because an assignation to a personal bond does not denude the cedent of the *jus crediti*, but is only of the nature of a procuratory giving power of exaction. And though, where there is no backbond, the same is irrevocable, as being *in rem suam*, yet still the *jus crediti* remains with the cedent ; and all exceptions go against the assignee, though by our custom there are some restrictions as to the probation. But, where a backbond is granted, the assignation becomes of the nature of a simple revocable mandate ; so that betwixt an assignation to a personal bond and a precept of sasine, there is this difference, that, in the one case, an assignation is only a procuratory without any conveyance ; in the other, an assignation makes a complete conveyance from one to another ; and thence it is that a personal bond will affect the assignee in the one case, and not in the other.

As to the *second* ground, it was *pleaded*, That the design of the registers being to secure singular successors by infeftment, it is a general rule, that singular successors by infeftment, must be secure against all latent private rights whatever ; and therefore it was concluded, were this backbond in its nature otherwise good against singular successors, it could have no place against Margaret Ferguson now standing infeft, upon the faith of the registers.

To the *first, answered*, That it is granted, backbonds purely personal, the design of which is simply to create a personal obligation upon the granter, and which do not affect or qualify any right in his person, are indeed not good against singular successors ; but since backbonds for the most part are designed to qualify or affect the right, as it is in the granter of the backbond, they must be good against singular successors ; for, if the right itself be once qualified or affected, it must continue to be so in whatever person existing. Thus, in the present case, since Baird's backbond does not only import an assignation to denude, but is a declaration, that he had not the absolute right of the heritable bond in his person, but only *qualificate* as trustee for a certain effect, viz. to lead an adjudication, the backbond must in its nature affect the right in whomsoever placed, because Baird could convey the right in no other shape than he himself had it. And so the distinction made betwixt an assignation of a precept, and a personal bond, were it even true, falls to the ground without effect. But, in the next place, there is no manner of foundation for the distinction ; an assignation to a precept of sasine is no more but a substitution in the right for granting and receiving the infeftment, and transmits no more in the case

No 47.

of an heritable bond bearing procuratory and precept, than another assignation does in the case of an ordinary moveable bond, bearing no such precept. One thing is clear, that the precept which is an accessory can be conveyed in no other manner than the personal obligation itself; and if an assignation to the personal obligation in the heritable bond be only a procuratory, it is incompatible, that any of its accessories should be torn from it, and conveyed to any other person than who has the personal right.

Answered to the *second* point, That our law makes a great difference betwixt the absolute property of lands, and a qualified right in lands for security of debt; See Stair, *lib. 2. t. 3. § 22. in med.* The first of these being in its nature a perpetual right and a proper subject for commerce, has the absolute protection of the law, so as no separate, latent deed can be good against it. But as for a right in security, it being in its design only temporary, without any view to pass from hand to hand, it has no special privilege indulged to it by the law, and therefore, even after infeftment, is qualified by backbonds, extinguished by discharges, and intromission with the rents of the subject given in security, equally as where there is no infeftment; which holds equally in infeftments of annualrent, adjudications, and all of that sort. But, *2do*, Whatever might be pleaded, if Margaret Ferguson had purchased *bona fide* from Baird after infeftment, the case here is quite otherwise, where Baird was never infeft, but had only a personal assignation. It is certain, from the nature of the thing, there is nothing to hinder even him who stands infeft in an absolute right to qualify it by a backbond; the reason then why irredeemable rights clad with infeftment cannot be so qualified, must be drawn from the particular disposition of our law concerning the publication of infeftments by registration; our law has prudently introduced the registering of infeftments for the security of purchasers; and of consequence, that infeftments should not be affected with any thing but what enters into the sasine and warrants thereof; when one therefore purchases upon the faith of a registered infeftment, there is good ground to plead, that he ought to be secure upon the footing of the infeftment as it stood recorded; but this will not apply to Margaret Ferguson's case, because she did not purchase upon the faith of the registers, but contracted with one not infeft, upon his faith, and therefore must lie open to his deeds. And there is no hardship here, where the remedy is so easy; for she had no more to do, but to infeft first her author, and afterwards herself; and then she would have contracted upon the faith of the register, and so been secure.—*3tio*, Margaret Ferguson is none of the *bona fide* onerous purchasers, that the law has taken under its particular protection; for she did not absolutely purchase this heritable bond, nor with ready money, but took a right thereto only in security of a debt owing her. Now, besides the favour of commerce, which has not so much place in the purchases of creditors, there is this consideration, that at present, if Margaret Ferguson be obliged to succumb, she is

in no worse state, than if the translation to her had not been made; whereas, had she paid money for it, her case had been that of one *certans de damno evitando*.

No 47.

Replied to the objection, That Margaret Ferguson purchased only a personal right, without infesting her author. It can make no difference, that she took infestment directly herself without infesting her author; for since the principle is, that backbonds do not qualify infestments, though she purchased what might truly be a qualified right, yet, so soon as she took infestment, no matter whether in her author's name, or her own, the right behoved to become thereby absolute. And, were this otherwise, there could be no conveyance of land-rights without every successor being infest, which yet are very frequent; for, if it should happen in the longest series, that any one disposer was not infest, this would lay an embargo upon the subject, and effectually exempt it from commerce for the course of the long prescription; no body being sure that the right was not extinguished in the person of him that was never infest, so as not to be capable thereafter of being conveyed. And in this view perhaps there would not be found many secure purchases in Scotland, which therefore would draw the registers to have a very limited effect.

"THE LORDS found, That the backbond granted by William Baird to Knockdolian, was not effectual in prejudice of the said Margaret Ferguson her infestment, she being a *bona fide* purchaser for an equivalent onerous cause; and therefore preferred the said Margaret Ferguson."

Fol. Dic. v. 2. p. 65. Dalrymple, No 151. p. 207.

1743. December 13. GORDON against GRANT.

GORDON of Craig granted to — of Tillyfour a disposition of certain lands, containing absolute warrandice, and receipt of the price; and Tillyfour executed an obligation, narrating, That he had detained 1000 merks, in satisfaction of a real incumbrance due to one Farquharson. Tillyfour disposed the lands to Grant of Rothmaise with absolute warrandice, and further assigned the warrandice in Craig's disposition. It appeared, that Rothmaise had retained the 1000 merks, though Tillyfour had some time after the sale granted a discharge of the price. As this incumbrance never was purged, Craig, whose separate lands were bound in warrandice, brought an action both against Tillyfour and Rothmaise for payment of the 1000 merks. THE LORDS found, That the action was not competent to Craig against Rothmaise, reserving to Craig his defences, if pursued for Farquharson's debt. See APPENDIX.

No 48.

Fol. Dic. v. 4. p. 66.

1762. February 26.

The CREDITORS of Sir ARCHIBALD COCKBURN, Elder of Langton, *against* The CREDITORS of Sir ARCHIBALD COCKBURN, Elder, and Sir ARCHIBALD COCKBURN, Younger of Langton.

No 49.

A disposition in security, and for relief of debts in general, sustained as to debts contracted prior to its date, though not particularly enumerated.

IN October 1688, Sir Archibald Cockburn of Langton, heritable proprietor of the lands of Borthwick and Simprim, &c. granted to his son, Sir Archibald, junior, a disposition of these lands, for security of all debts for which he and his son were mutually bound.

The family affairs having fallen into great disorder, Sir Archibald and his son became utterly insolvent in 1690. A process of ranking and sale was commenced in 1694; but, by many unforeseen accidents, and the attempts of the friends of the family to purchase up the creditors' claims, the estate was not brought to a sale till 1757; during which period, it remained under the sequestration of the Court. Those creditors who were secured by preferable infestments of annualrent, had their claims fully discharged at the conclusion of the ranking and sale; and the estate, from change of time and improvement, having yielded a much greater price than was expected, there remained no less than L. 6000 Sterling, which became the subject of competition between the creditors of Sir Archibald, elder, singly, and those creditors to whom both father and son were mutually bound.

The proper creditors of Sir Archibald, elder, brought a reduction of the deed 1688, upon various grounds, which the Court confined to these three distinct questions: '1mo, Whether the disposition by Sir Archibald the father to his son, (being only for relief of debts contracted, without mentioning any particular debt,) with the charter and sasine following on it, vested any real right in Sir Archibald the younger? 2do, Supposing Sir Archibald the elder insolvent at the date of the disposition 1688, Whether that disposition, not being *omnium bonorum*, was reducible as *in fraudem creditorum*? 3tio, Whether, *post tantum temporis*, it was competent to the pursuers to insist in this ground of reduction, especially after the judicial proceedings in the former ranking, relative to the estate of Langton?'

On the *first* of these points, *pleaded* for the pursuers; A deed of this complexion is totally inconsistent with the security of the lieges, and repugnant to that confidence which, from the time of their constitution, has been afforded by the records in all transactions connected with heritable property.

In this matter, the Legislature has shown the greatest anxiety, by appointing particular registers, in which all the diligences, burdens, and limitations, affecting heritable rights, were to be specially and distinctly ingrossed and enumerated. A particular register was appointed for the abbreviates of all adjudications, in which the names of debtor and creditor, the debt for which they are led, the date of the executions, and the names of the witnesses, messenger,

and clerk, along with the superior's, must be inserted. In order to make this record productive of all the beneficial consequences for which it was intended, the precise sum and extent of the debt, for which the adjudication was brought, must appear; for, it is of little consequence to a creditor or purchaser to discover, that an estate is affected by legal diligence, if he is not, at the same time, informed with what consequences it must be attended, and what sums are real burdens upon the property of the person with whom he contracts; as, in proportion to their extent, his security in either of these two characters must be diminished or increased. The record of inhibitions requires the same accuracy and precision; and a diligence of this kind, without any particular mention of the sums for which it is led, has been found ineffectual, and no sufficient reason to bar others from dealing with the persons inhibited; see INHIBITION. Upon the same principles, a general deed of entail of all the maker's lands, however binding upon the maker and his representatives, is void and ineffectual as to third parties. In the same manner, a right of reversion, couched in general terms, as to the sums for which the lands should be redeemable, could never be sustained, though it had regularly been recorded in the register of reversions; and the greatest Lawyers, particularly Dirleton and Sir James Stewart, have given it as their opinion, that a right of redemption, upon payment of all sums that should be owing by the grantor, would be altogether ineffectual against singular successors; as the security of the lieges demands, that the precise sum shall be mentioned for which the lands can be redeemed. A general heritable bond, also, without any particular mention of the sums for which it is granted, will confer no real burden or right of preference upon the lands; and yet such bond would not be attended with so many inconveniences, as the disposition in security under reduction; for a general discharge of this bond by the creditor, upon record, would be sufficient evidence that it was actually extinguished. But, if a deed granted in security of sums jointly contracted to a number of creditors, whose names do not appear upon record, can be made real by infeftment, no discharge or renunciation whatever can afford sufficient security against a number of claims, all of which are concealed, and most of which there is no possible way to discover.

But, without resting the determination of this point upon general observations, the positive resolutions of the Legislature itself may be urged in favour of the pursuer's plea. By the act 1696 it is provided, 'That all infeftments granted for relief of debts, not only presently due, but what should be afterwards contracted, shall be of no force as to any such debts that shall be found to be contracted after the sasine or infeftment following upon said disposition.' Now, surely the provision of this statute, with regard to future contractions after the infeftment, is equally strong and applicable to debts contracted in general, though the period of their constitution was prior to the infeftment following upon the disposition; for it makes little difference, either in point of

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security or intelligence, whether a deed is granted for relief of debts to be contracted, or for such as are really contracted, but not particularly mentioned and described ; both are equally dangerous and fatal to that security which ought always to accompany every transaction relating to heritable property ; both come equally under the prohibition and spirit of the statute, and both ought to be equally rejected.. Vague and indefinite burdens are contrary to the spirit of law, and have always been discouraged. And this doctrine was thoroughly established, as far back as 1710, in a question between the Creditors of Sir Alexander Murray of Stanhope and Mr Douglas of Broughton, See APPENDIX.

Pleaded for the defenders, the Creditors of Sir Archibald elder and younger jointly ; By the feudal law of this country, every debtor is empowered to give a pledge of his estate to his creditors, or to impose upon it real burdens, calculated for their security. It is altogether inconsistent with the spirit of our law to say, that a debtor should be so circumstanced, as only to have it in his power to grant dispositions in security of debts actually due, while, at the same time, he is deprived from making any provisions for the payment of his future contractions. The same liberty was allowed in both cases by the most antient constitutions of this country ; and, though the method of granting dispositions, in security of debts to be contracted, in process of time was found to be attended with bad consequences ; yet the restraints of the Legislature, imposed contrary to the original spirit of the feudal law, ought to be confined entirely within those bounds which it has particularly described. The statute 1696 can be of little service to the pursuers in this question : It only annuls securities for debts not actually contracted before the time of rendering the burden upon the lands real by infeftment : But there is not a word tending to show the invalidity of general securities, granted for debts not particularly mentioned, but actually contracted previous to infeftment. If, therefore, there is no prohibition in this statute, with regard to deeds of the same nature with the one now under challenge, it would be extremely hard to put such an extensive interpretation upon its words, especially when the disposition 1688 was granted for security of debts in general, that had been actually borrowed a great number of years before the statute 1696 had a being.

With regard to the *second* point, " Whether the disposition 1688, not being '*omnium bonorum*, was reducible, as in *fraudem creditorum* ;" the pursuers mentioned ; That, if any deed of a debtor was ever determined to be fraudulent and collusive, the present, above all others, most justly merited those appellations. That the evident design of it was to cut out all the proper creditors of Sir Archibald the elder, while, at the same time, it was entirely impossible to protect any subject, belonging either to father or son, from the diligence of the son's creditors ; because the father was always jointly bound with him : So that a surrender of all the son's estate to the father would have been entirely ineffectual ; while, at the same time, this disposition by the father to the son was

an absolute and universal exclusion of the father's creditors, properly so called; and, by this means, there might have been a reversion out of both estates to the son, which the father's creditors could not reach. But further, this disposition appears not only fraudulent and unfair, from the suspicious circumstances with which it is attended, but it is expressly declared to be so by the statute 1621, the first clause of which provides, ' That all alienations made by a debtor to a conjunct or confident person, without true, just, and necessary causes, and without a just price really paid, are null and of none avail, at the instance of the true and just creditors.' According to the construction put upon this statute by practice, it is requisite that the onerous cause of the deed should be proved, otherwise than by its own narrative; but, in this case, there is no other evidence of the onerosity of the disposition; and it certainly can never be pretended that there was any necessary cause for granting it in disappointment of the father's own creditors. It is of little significancy, whether the just and lawful creditors had used any diligence or not, as it has been repeatedly determined, that no debtor or bankrupt has it in his power, by a palpable act of injustice, to gratify any creditor at the expense of another; and, in this case, there were the strongest presumptions of Sir Archibald's being insolvent at the date of the disposition, that he knew himself to be so, and granted this security to his son with the most fraudulent intention.

In answer to these arguments, the defenders maintained, That there was no proof of Sir Archibald's insolvency earlier than the year 1690: That, if dispositions, such as the present, at so great a distance of time, were to be reduced, in consequence of a nice scrutiny of people's circumstances, which were neither challenged nor suspected when such deeds were granted, it might be attended with the most fatal and dangerous consequences; and that, at any rate, such alienations as are mentioned in the statute, are only reducible when made in defraud of prior creditors.

With regard to the last point, " Whether, *post tantum temporis*, it was competent for the pursuers to insist in this ground of reduction, especially after the judicial proceedings in the former ranking;"—the pursuers maintained, That every consideration was clearly in their favour; that their rights had been produced as far back as 1694, when the first ranking commenced; and that this production necessarily reserved to them every plea competent in law against the rights of the other competing creditors: That, so long as these rights were in the field, and the process of ranking and sale in dependence, however many interruptions might have obstructed its completion, yet still their rights were preserved entire and absolutely secure against prescription: That, allowing the assertion of the defenders to be true, that the rights of the pursuers had not been produced in the ranking till 1738, after the years of prescription had run; yet it could not be denied that they were produced in 1691, in a process of poinding the ground, at the instance of Sinclair of Carlourie, and that the production of rights in a poinding of the ground must have the same effect to inter-

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rupt the prescription as if they had been produced in a process of ranking, the only difference between the two being, that the subject of competition is greater in the one case than the other.

The defenders *answered* ; That the weight put by the pursuer upon such a general of rights was altogether unprecedented : That an implied challenge or reduction could never operate further than an express summons of reduction, raised upon general grounds ; and that it had been decided very lately, in the case of Arnot *contra* Paterson, (*see* PRESCRIPTION,) that a summons of reduction does not interrupt prescription, as to grounds not particularly libelled : That, in the present case, the implied reduction was only general ; and, consequently, could be in no better situation than an express reduction conceived in the same terms : That every person must be informed upon what side he is to be attacked ; and that a general challenge can never enable him to prepare for his defence : That a reduction *ex capite inhibitionis*, *ex capite lecti*, or upon any other particular ground, could never entitle the person, after forty years, to challenge the deed upon the act 1621, or any other ground, not particularly libelled : That the production in the process of poinding the ground could never have the effect contended for by the pursuers, as a competition about the rents of an estate differs widely from a competition about the price of it after it is sold : That, during the whole process of ranking, decreets of preference had been pronounced and extracted, upon the supposition that the disposition 1688 was a valid and effectual deed ; and, therefore, it would be extremely severe to annul proceedings which were esteemed regular and formal, and which cannot be denied the force of a *res judicata* against the plea of the pursuers.

“ THE LORDS found, That the disposition granted by Sir Archibald Cockburn the elder of Langton, to his son Sir Archibald, in the year 1688, for security and relief of all engagements the son had come under for the father, and specially declaring, That all bonds, wherein they stood jointly bound, were the proper debts of the father, upon which disposition infestment followed, was a valid and legal security to the son upon the estate disposed, for his relief of all debts wherein he stood jointly bound with the father, preceding the date of the disposition, notwithstanding the particular debts were not specified ; and that Sir Archibald the son was thereupon preferable to all the creditors of the father, whose rights were not made real by infestment before the date of the infestment taken by Sir Archibald the son, and that to the extent of the debts aforesaid, for which the infestment for security and relief was granted ; and, in respect the respondents, the creditors of Sir Archibald the father only, did not allege that the estate conveyed by the father to the son exceeded in value the extent of the debts for relief of which the son was infest, found, That they could not draw any part of the price of that estate ; and, in respect they had no interest to challenge the preference established by the decret of ranking, upon the footing of the infestments granted by Sir Archibald the younger, found, That the

said infeftments were valid and effectual rights to the creditors ; and also found, That an enquiry into the situation of the circumstances of Sir Archibald Cockburn the elder of Langton, at the date of the disposition made by him to his son in 1688, was not competent *post tantum temporis*."

No 49.

For the Creditors of Sir Archibald elder and Sir Archibald younger, *Ferguson*.

For the Creditors of Sir Archibald elder, *Garden, M^cQueen*.

A. W.

Fol. Dic. v. 4. p. 65. Fac. Col. No 84. p. 184.

1765. February 15.

M^cKINNON against Sir JAMES M^cDONALD.

No 50.

The deeds of the actual heir affect the estate, altho' he be afterwards obliged to denude.

THE estate of Mackinnon stood disposed to John Mackinnon younger, and the heirs-male of his body ; whom failing, to any other son of the body of John Mackinnon elder ; whom failing, to John Mackinnon tacksman of Mishinish. Upon the death of John Mackinnon younger without issue-male, Mishinish served as nearest and lawful heir-male of provision, and was infeft. Some years after, a son, Charles, was born to old Mackinnon. Charles having insisted against Mishinish to denude, the LORDS found, That the pursuer had right to the estate of Mackinnon from the time of his birth, and that the defender was obliged to denude in his favour. Afterwards, Charles having obtained himself served heir of provision in special to his brother deceased, brought a reduction for setting aside the sale of the lands of Strath, a part of the estate of Mackinnon, which Mishinish, during his possession, had sold to Sir James Macdonald, who was already infeft. *Pleaded in defence, 1mo*, That as Mishinish was rightly served, so all his onerous acts and deeds must be effectual against the estate ; *2do*, That the obligation to denude was merely personal, and could not affect the right of a third party, who purchased *bona fide* upon the faith of the records, while the right of Mishinish subsisted. *Answered to the first*, That Mishinish's right was merely conditional, and defeasible in a certain event, in the same manner as rights to lands given in a donation *inter virum et uxorem*, which, though indefeasible, *ex facie*, are affected by an implied condition, upon the existence of which they become void, as if they had never existed. A putative heir possesses under a similar condition ; and the consequence is, that as soon as the true heir appears, his infeftment becomes void, and every burden flies off, which he has imposed upon the estate. *Answered to the second defence*, That the obligation of Mishinish to denude was not personal, but was an inherent condition in his right. Nor has this doctrine any tendency to weaken the security of the records ; for unless in the case of an entail, the law promises no security to a purchaser from looking into the last infeftment, whether it proceeded on a charter or a retour. If it proceeded on a retour, as in this case, it is incumbent on him to look into the destination in the charter ; and he cannot be secure, if the service be not agreeable to that destination, or.

No 50. if any of the heirs preferably called either do or may exist. THE LORDS repelled the reasons of reduction, and sustained the sale of the lands made by Mishinish during his possession.

Mishinish, while in possession of the estate of Mackinnon, of which he was afterwards obliged to denude upon the supervention of a nearer heir, as explained above, had provided his wife in the locality of certain lands, part of the estate of Mackinnon. After the death of Mishinish, his widow having brought an action for the mails and duties of her locality lands, the LORDS, upon the same *ratio* on which they had given the former judgment, decerned for payment against the heir in possession.

Fol. Dic. v. 4. p. 67. Fac. Col.

* * This case is No 34. p. 5279, and No 35. p. 5290, *voce* HEIR APPARENT.

1781. July 4. KATHARINE CLARK *against* JOHN ROBERTSON and Others.

No 51.

A party conveyed his estate to trustees, directing them to pay his debts, and account for the residue to his son. The trustees, without entering on the management, decerned in favour of the son, who became insolvent. A person to whom the father had been personally liable for an annuity, found to have no preference.

ALEXANDER HARVEY left a considerable estate to his three daughters, burdened with an annuity of L. 65 Sterling to Janet Clark, his relict. One of the daughters was married to Joshua Johnston; who, wanting money to throw into trade, prevailed upon his mother-in-law to make way for a sale of the subjects, by giving up her security, and accepting of a personal bond for her jointure, from him and the other partners of a company in which he was engaged.

Among these were John and James Jamieson, father and son; who, in this way, came to be personally liable for Mrs Harvey's jointure. John, some time before his death, executed a settlement in the form of a trust-disposition, whereby the trustees were directed to convert his estate and effects into money, for payment of "all his just and lawful debts," particularly certain family provisions therein mentioned, and to account to his son, James, for the residue.

Upon John's death, his trustees, without entering upon the management, executed a disposition, proceeding upon the narrative, that James had paid or given security for the provisions and debts specified in his father's settlement, and had become bound "to satisfy and pay other debts, and perform any other deeds that might be owing or prestable by his late father;" and, therefore, disposing to him, his heirs, and assignees, the subjects and rights vested in them by the trust-disposition above mentioned.

James accordingly took possession of every thing, and continued in good credit for several years. But, being engaged, as a partner, with Buchanan, Hattie, and Co. who failed, he found it necessary to convey his whole subjects, heritable and move, to trustees, for behoof of his creditors.

Against these trustees, Mrs Harvey brought an action for having it found, John Jamieson's heritable estate was really burdened with her annuity, for which he, along with Joshua Johnston and others, had given bond; that, in

virtue of that bond, and the trust-disposition executed by him, she was a real creditor upon his estate; at least, that the obligation constituted by said bond in her favour, was a preferable debt, in the question with a creditor of James Jamieson, or Buchanan, Hastie, and Co.

In the course of this process, Mrs Harvey died; but the cause was taken up by her sister, Katharine Clark, as having right to the bygone annuities; and, for her, it was

Pleaded; John Jamieson became debtor for the annuity in question, by joining as co-obligant in the bond granted to Mrs Harvey. The payment of his debts was one of the primary objects of the trust-deed executed by him; and all that James had right to was, the residue or reversion. The subsequent conveyances, from the original trustees to James, and from him to the defenders, had both of them that trust-deed for their basis; and, therefore, could carry no more of the estate belonging to John, than what remained free, after paying all his creditors.

Had James made up titles to the estate in question, as heir; and, after possessing it for three years, had conveyed it to trustees for payment of his debts, it may be admitted, that his father's creditors would have had no preference over his own; but, coming in place of the trustees appointed by his father, the purposes of that trust remaining unexecuted, he could not, in any way, disappoint the *jus quasitum* which his father's creditors had over the estate assigned to him. Had James himself been sole trustee, he could not have inverted the estate to the payment of his own debts; and, it does not occur, how his right should be rendered broader, by his coming in the place of the trustees.

Answered; James Jamieson's credit was such as fully justified his father's trustees in giving up the management to him; and, accordingly, they were absolved from an action at the instance of one of John Jamieson's creditors, who endeavoured to make them liable for his debt, on account of their having conveyed the estate to James, without taking security, that the purposes of the trust should be fulfilled.

James, however, stands in a very different situation. He was his father's apparent heir; the residuary legatee of all his effects; and, when he accepted of them without inventory or account, under the condition of paying his father's debts, he subjected himself universally to all such claims. He is, by the act 1695, by the express tenor of the settlement, and by every rule of law, liable to pay them to the last farthing.

At the same time, the creditors of John Jamieson have no real *lien* or preferable claim over the subjects. If they have, they must be preferred not only to James's personal creditors, but to such as, trusting to the public records, may have lent him money on the security of an estate which appeared to be altogether unencumbered.

But, that they have no such lien, is evident from this consideration, that, if

No 51. the original trustees had exercised the power conferred upon them by the trust-disposition, and sold the subjects, a purchaser from them would have been safe; and, had the trustees, instead of fulfilling the purposes of the trust, applied the money to their own use, the creditors of John Jamieson would have been in no better condition than the private creditors of the former.

Even supposing that the subjects had been conveyed, without the intervention of trustees, to James himself, but under the same burdens and conditions as occur here, the obligation to pay "debts in general," could never have constituted a real security in favour of such creditors; Broughton *contra* Gordon, June 20. 1739, *infra* *b. t.*; Stenhouse *contra* Innes, February 21. 1775, *infra* *b. t.*; Camerons *contra* Creditors of Cameron, *see* APPENDIX. Neither is it very obvious how the word *trust* should make any alteration on the nature of the deed. Every disposition by a father to a son, with the burden of debts, is a trust; but still the burden remains personal, unless the debts are specially enumerated in the disposition, and engrossed in the investiture. Were it otherwise, the security of the records would be overthrown; and, henceforth, every settlement would be conceived in the form of a trust-conveyance to the heir, with a general burden of latent family-provisions, sufficient to cover the whole estate, and to prevent it from being affected by any debt he might contract.

In the present case, the record did not point out James as even nominally a trustee. He completed his feudal title upon the procuratory contained in his father's disposition, which the trustees had never exhausted, and appeared as absolute proprietor in his own right, with the burden only, which the law itself laid upon him at any rate, of paying his father's debts. To that effect, he was, no doubt, personally bound; but no real *lien* was created upon his property; Erskine's Institute, B. 2. T. 3. § 48. & 49.

Replied; It is of no consequence that the debt in question was not particularly mentioned in the trust-deed; nor is it necessary for the pursuer to contend, that her sister had a real *lien* over the subjects, which would have affected a singular successor. No such *lien* was created in favour of any of John's creditors; on the contrary, the trustees were empowered to sell the subjects; but, while they remain unsold, they are primarily liable to the granter's creditors, whose interest cannot be affected by the debts of the trustees, or those to whom they assigned the subjects.

It may be admitted, that, where the absolute property is conveyed, either to an heir or to a stranger, with the general burden of all the granter's debts, no real *lien* is established in favour of the creditors; but, here, there was no conveyance of property. The subjects were disposed in trust, for certain purposes particularly mentioned; and, so long as they are held under that title, they must, in the first place, be applied to those purposes.

THE LORDS found, "That Katharine Clarke had no preference over the other Creditors of James Jamieson for the debt in question."

No 51.

Lord Ordinary, *Justice-Clerk.* Act. *Wight.* Alt. *Ilay Campbell.* Clerk, *Tait.*
L. Fol. *Dis. v. 4.* p. 66. Fac. *Col. No 71.* p. 119.

1786. November 15.

RICHARD THOMSON *against* Messrs DOUGLAS, HERON, and COMPANY.

No 52.

THOMSON, in consequence of a contract entered into between himself and his man of business, disposed his lands to the latter, "heritably and irredeemably, in order that he might sell the same, and apply the proceeds for the behoof of Thomson." The disponee executed the procuratory of resignation, and obtained a charter from the Crown, on which he was infeft; but as he omitted to insert in the procuratory the above qualification of his right, it did not appear on the record. Being debtor to Douglas, Heron, and Company, he conveyed those lands to them, in security of his debt. Afterwards, others of his creditors adjudged the lands, but without taking infeftment.

A disposition was granted for the behoof of the disponer, but in the terms of an absolute conveyance. The disponee granted heritable security over the property to creditors of his own. Found effectual. But adjudgers, take *tantum et tale*.

Thomson instituted an action of reduction on the head of fraud, of the right obtained by his disponee, alleging that the latter had fraudulently failed to apply properly the value of the estate; in which action appearance was made for Douglas, Heron, and Company, and for the adjudging creditors. The pursuer

Pleaded; The right of the disponee was in the nature of a trust; the property of the estate still remaining substantially in the disponent; and the only power given to the disponee being that of disposing of it for a price, for which he was to be accountable to the disponent; his assuming the character of unlimited proprietor, in order to which he omitted to engross the conditions of his right in the procuratory of resignation, was a gross fraud, and must import a *laes realis* in the conveyance in question; especially as this was granted for a prior debt, and not for money instantly paid on account of such security.

Answered; "A purchaser or a creditor contracting upon the faith of the records, cannot be affected by any personal challenge upon the head of fraud, that may lie against the person with whom he contracted;" (see above in this Section.) Nor are the adjudging creditors in a different situation.

Observed on the Bench; If a disponee omit to engross in his infeftment those clauses which were meant by the disponent to limit or qualify his right; if, for example, a clause of redemption be so left out of the infeftment, the disponent by this fraud can in no shape be hurt. The right will not be unlimited; because what was truly bestowed on the disponee was only a limited right. But in the present case, the disposition imported absolute and unlimited property; although, as the counter-part of this grant, there arose a personal obligation on the disponee to render account. And whether this has been justly fulfilled, or

No 52.

fraudulently violated, the right of property remains equally unaffected. A *bona fide* purchaser, therefore, might have effectually acquired such property from the disponent; and an heritable creditor by infestment is held to be in the same situation. The adjudging creditors stand, however, in a different predicament; for, as it has been found by decisions, which, for the stability of the law, ought not to be departed from, they must take the right of their debtor *tantum et tale* as it was in his person.

THE LORDS found, "That the allegation of fraud was not relevant against the heritable securities and infestments; but that it was relevant as to the creditors-adjudgers *."

Lord Ordinary, *Swinton*. Act. *Solicitor-General*. Alt. *Abercromby*. Clerk, *Hume*.
8. *Fol. Dic. v. 4. p. 67. Fac. Col. No 294. p. 453.*

1789. December 4.

AMELIA LAMONT, against The CREDITORS of LAUCHLAN and ARCHIBALD LAMONT.

No 53.

Sums with which a conveyance of lands was burdened, found to be preferably secured, in a question with the Creditors of the disponent, tho' no infestment had followed.

LAUCHLAN LAMONT, in case of his dying without male-issue, conveyed his lands of Auchagoyle to Archibald Lamont, burdened with the payment of his debts, and a legacy of L. 100 to each of his three sisters.

The precept of sasine accompanying this conveyance, was declared to be granted under the following among other conditions; "That in the event of Archibald Lamont or his heirs attaining possession of the lands, he or they should pay the disponent's lawful debts, and the sum of L. 100 Sterling to each of Isabel, Grizel, and Amelia Lamonts, the disponent's sisters; which sums to the said three sisters should be paid within twelve months after the disponent's decease, with a fifth part more of penalty in case of failure, and annualrent of the principal sums from and after the time of the disponent's death, during the not payment; and which sums were, in the event of their becoming due, declared to be real burdens upon the lands till paid off"

After the decease of Lauchlan Lamont, and of Archibald Lamont the disponent, who never executed the precept of sasine in his favour, the creditors of both proceeded to attach the lands of Auchagoyle. Among others, Mrs Amelia Lamont obtained a decret of constitution against the heirs of Archibald Lamont for the L. 100 due to her; and after using general and special charges, she instituted a summons of adjudication, which was conjoined with a previous one brought by another creditor.

* It may be remarked, that the disponent, who had become bankrupt, also appeared in the action, for the vindication of his character; and denied that he had been guilty of any impropriety. It was, however, merely a question of relevancy; and the facts were regarded as hypothetical.

In the ranking which followed, Mrs Lamont having claimed a preference over those creditors who were not really secured, the common agent objected, and

Pleaded ; There can be no permanent burden on landed property without infeftment ; and therefore the legacies in question, though intended to be made real, must be considered as obligatory on the grantee only. By taking infeftment without any notice of the legacies, it was in the power of the grantee to defeat the testator's purpose ; and his creditors, who attach the rights that belonged to him, without any obligation to fulfil those engagements he may have come under, cannot be affected by them. The situation of the legatees, even if they had been authorised to take infeftment, must have been the same, until they were actually infeft, as if they had obtained an heritable bond on which no sasine had ever followed. But as it was not put in their power to complete their right in this way, it would be equally inconsistent with the established law, and with the design of the public registers, if any preference were now to be given to them, see Section 8th *h. t.*

Answered ; It is true, that no incumbrance can be laid on landed property which does not enter one or other of those records which have been prepared for the purpose. It may also be admitted, that in this case Archibald Lamont in whose favour the conveyance was granted, by executing the precept of sasine, without any notice of those burdens which were meant to accompany his right, might have placed the legatees in the situation of personal creditors only. But as no infeftment has followed, and as his creditors coming in his place cannot warrantably proceed to take infeftment, without engrossing in the sasine those conditions which were annexed to the grant, the question must here be determined in the same manner as if the right had been completed by the disponee himself, as it ought to have been. In such a case, it will not be disputed, that the sums due to the legatees would have been a real burden on the lands.

The question having been reported on informations, the Judges were unanimously of opinion, That Mrs Lamont had a preferable right.

The cause having been remitted to the Lord Ordinary, his Lordship pronounced an interlocutor in favour of Mrs Amelia Lamont.

Reporter, Lord Justice-Clerk.
W. M. Bannatyne.

For the Creditors, A. Macdonald.
Clerk, Menzies.

For Mrs Lamont,

G.

Fol. Dic. v. 4. p. 66. Fac. Col. No 95. p. 172.

* * See a case between the same parties, No 61. p. 5494, *voce* HERITABLE and MOVEABLE.

1792. May 18.

STEWART *against* HOME.

No 54.

STEWART of Argaty, by deed of entail, disposed his lands to his brother George and a series of substitutes, and appointed the following condition to be engrossed in the infeftments, "That the said George Stewart shall be burdened with, and obliged to pay, the whole just and lawful debts owing by me at my death, &c. and certain provisions." George succeeded and made up titles under this deed, and having died, his widow claiming a terce out of the lands, it was *objected*, That the estate being settled on her husband under the burden of the entailer's debts and provisions, these must, *pro tanto*, diminish the terce. *Answered*, Where lands are disposed as burdened with certain debts, these are real liens; but where the disponee or heir is only taken bound to pay, as in the present case, they remain personal. THE LORDS found, That the burdens were personal on the heir, and not real on the lands.

Fol. Dic. v. 2. p. 51. Fac. Col

* * This case is No 11. p. 4649, *voce* FOREIGNER.

SECT. V.

Clauses burdening Conveyances.

1661. December 20. HUGH MONTGOMERY *against* LORD KIRKCUDBRIGHT.

No 55.

A party was barred from pursuing a process of ejection, although the defender had no real right, but only a personal obligation of the pursuer to grant to the defender a real right.

HUGH MONTGOMERY of Crainshaw, and — M'Clellan his spouse, pursue the Lady Kirkcudbright, for ejecting them out of the five pound land of Overlaw, and craved re-possession, and payment of the mails and duties intromitted with. The defender *alleged* no process, because it is not alleged that the pursuers were in natural possession; for only the natural possessors can have decret of ejection, because, if there be no deed of violence libelled, but only intromitting with the mails and duties, ejection is not competent, nor any violent profits, but only action for mails and duties against tenants or intromitters. The pursuers *answered*, That the ejection may be competent though the pursuer was not in natural possession, when a tenant is ejected, and a stranger without interest enters in the natural possession; albeit the tenants should collude or neglect, the heritor having but civil possession, by uplifting of mails and duties, needs not warn the ejector, but may crave to be entered to the natural

possession and the violent profits. The defender *alleged*, the case is not here so, unless it were *alleged* the tenants were cast out; but the defender may defend the right to the mails and duties upon a better right than the pursuer. The pursuer *answered*, That he declared, he craved only re-possession to the ordinary profits. THE LORDS ordained the parties to dispute their rights to the mails and duties, and possession, as in a double poinding, and as if the duties were yet in the tenants hands. The defender *alleged* further, that she hath right to the mails and duties, because she offered her, to prove, that the pursuer's father-in-law granted a back-bond, obliging himself and his heirs, to redispone these lands to umquhile Robert Lord Kirkcudbright, from whom the said lands were appraised, to which appraising the defender hath right, and thereby has right to the back-bond, and that the defender's wife represents her father as heir, or at least as lucrative successor after the back-bond; and so as he might thereupon have debarred the grant of the back-bond, so might the pursuer as representing him. The pursuer *alleged*, 1st, *Non relevat*, because the said back-bond is but a personal obligation, and the defender had thereupon no real right but only to the superiority; because, by discharge of the feuduty produced, he acknowledged the pursuer to be proprietor. 2dly, If any such backbond was (no way granting the same,) he offered him to prove that it was conditional, so soon as the said umquhile Robert Lord Kirkcudbright should require: *Ita est*, he has never required. The defender *alleged*, he had done the equivalent, because in a double poinding formerly pursued by the tenants, he had craved preference; and the pursuer *alleged*, upon the condition of requisition in the back-bond, and also that by the back-bond the granter and his wife's liferent was preserved; whereupon the defender was excluded.

THE LORDS found the allegiance of the said double poinding was not equivalent to the requisition; and therefore found the replies relevant, and assigned a day to the defender to produce the back-bond, and to the pursuer to prove the quality thereof; and so found the reply not to acknowledge the defence, but reserve it to either party to allege *contra producenda*, and found the personal obligation sufficient to debar the pursuer, albeit the defender had no other real right, seeing thereby she was obliged to grant a real right to the defender.

Stair, v. 1. p. 72.

1664. June 25.

CAUHAME against ADAMSON.

No 56.

THOMAS CAUHAME having appraised a tenement in Dunbar, from Joseph Johnston, pursues James Adamson to remove therefrom; who *alleged* absolutor, because this appraiser could be in no better case than Johnston, from whom he appraised, whose right is affected with this provision, that he should pay L. 600-

No 56.

to any person his author pleased to nominate ; *Ita est*, he hath assigned the right to the defender, so that it is a real burden affecting the land, even against this singular successor, and included in his author's infestment. The pursuer *answered*, That albeit it be in the infestment, yet it is no part of the infestment or real right, but expressly an obligation to pay without any clause irritant, or without declaring that the disponent's infestment should stand valid, as to the right of that sum :

The which the LORDS found relevant, and repelled the defence, but superceded execution, until some time that the defender might use any means he could for making this sum to affect the land.

Fol. Dic. v. 2. p. 66. Stair, v. 1. p. 207.

No 57.

Lands were disposed with a provision in the disposition and infestment, that a sum of money should be paid by the receiver of the disposition to the disponent or any he should name, and in case it should not be paid, the right should be void. It was found that the clause and provision were effectual against singular successors.

1666. November 7.

CUMING against JOHNSTON.

SOME lands in Dunbar being disposed by one Adamson in favours of Johnston, with a provision contained in the disposition and infestment, that a sum of money should be paid by the receiver of the disposition to him, or any he should name ; and in case it should not be paid, the right should be void ; and the said lands being thereafter apprised, it was found against the complainer, that the said clause and provision were real ; and that the person named, and having right to the sum and benefit of the said clause, though before declarator he could not pursue a removing, yet he has good interest to pursue for the mails and duties for payment of the said sum ; and being *in possessorio*, to retain the mails and duties for payment of the said sum *pro tanto* ; and that the said provision, and such like, are effectual against singular successors. It was *urged* by some, That all that could be done upon that clause was, that a reduction of the right might be pursued thereupon ; but it was *answered*, that it being *actum*, that the lands should be burdened with that sum, and if nothing more had been exprest, but that it is provided that the said sum should be paid, the said provision being real, would have furnished the said action and exception, for payment of the said sum out of the mails and duties ; and therefore, the subjoining the resolute clause, being *ad majorem cautelam*, could not be prejudicial nor retorted in prejudice of the disponent nor his assignee. This question was hinted at but not decided in the said debate, viz. If the declarator should be pursued upon the said clause for annulling the right, if it should operate in favours of the assignee, the lands not being disposed to him but in case of contravening, being to appertain to the disponent and his heirs, in case the right should be rescinded ? It is thought, that the provision being assigned, the whole benefit and consequence of the same are disposed ; and consequently the assignee, in the case foresaid of annulling the right, may pursue the heirs of

the disponent and receiver of the right and his successor, to denude themselves of the right of the said lands.

No 57.

Reporter, *Newbyth*.

Fol. Dic. v. 2. p. 66. Dirleton, No 42. p. 16.

. This case is also reported by Newbyth, under the names of Canham against Adamson.

1666. *July 10.*—THOMAS CANHAM having comprised a tenement of land in Dunbar, from Joseph Johnston *in anno* 1662, and being thereon infeft, and as heritor of the said tenement, warned James Adamson, possessor of the said land, to remove at Whitsunday 1662. Whereupon, in June 1664, he obtains decret of removing; and now having intimated action of violent profits of the said tenement, being the double avail within burgh since the warning, in which process this defence is proponed, viz. That he cannot be liable for the mails and duties, because in the disposition of the said tenement by George Adamson to Joseph Johnston, one from whom the pursuer comprised, there is an express provision, that the said Joseph Johnston and Christian Adamson shall pay and deliver to the said George Adamson, or his assignees, under the pain of annulling of the said disposition, the sum of L. 600, whereunto the defender is made assignee. Whereunto it was *answered*, That the foresaid provision in the said disposition, is only a ground of a personal action against Joseph Johnston, seeing they are only obliged to make payment thereof personally, and cannot meet the compriseder. *2do*, The foresaid provision cannot be a ground for returning the mails and duties, seeing it is not of the nature of an annualrent, or right of property, otherways it would have defended in the removing, where it was proponed and repelled. And, although it were of the nature of an annualrent, as it is not, he cannot brook the mails and duties by virtue thereof, unless he had pursued a pointing of the ground, and *habili modo*, had affected the lands therewith. *3tio*, The defender is a violent possessor, and so cannot be in a better condition than if he had removed, *quo casu* he could never have retained the mails and duties, but would have been liable to the violent profits. THE LORDS repelled the defences, in respect of the replies and clause contained in the disposition, which is found only a ground of declarator; and therefore decerns, reserving the defender's action of declarator as accords.

1666. *November 7.*—In the action mentioned 10th July last, Canham against Adamson, for mails and duties, it was farther *alleged*, That the reservation contained in the disposition being likewise contained in the sasine, must likewise affect the tenement; so as albeit the right pass through a thousand hands, it must always be with the burden of the reservation. THE LORDS found, That, albeit it was only personal, being contained in the disposition, yet being likewise in the infeftment, the same behooved to be real; and that the

No 57.

defender might either pursue for the same, reserved to him in the disposition and sasine, or otherways retain the same, *contra quodcunque*.

Newbyth, MS. p. 70. and 82.

* * * Stair also reports the same case:

1666. *July 10.*—THERE was a disposition of some tenements in Dunbar, containing this provision, that the buyer should pay such a sum of money to a creditor of the sellers, under the pain and penalty, that the said disposition should be null. Infestment followed upon the disposition, and the land is now transmitted to singular successors, who pursuing for mails and duties. It was *alleged* for the creditor by the reservation, that this reservation being a real provision, the creditor must be preferred to the mails and duties, ay and while the sum be paid. It was *answered, first*, That this provision was neither in the charter nor sasine, and any provision in the disposition could only be personal, and could not affect the ground nor singular successors, seeing no inhibition nor other diligence was used on it before their right. *2dly*, Albeit it had been a provision in the investiture, yet it could have no effect against the grounds; which cannot be affected but by an infestment, and upon a provision, neither action nor pointing of annualrents, nor mails and duties could proceed. It was *answered*, That real provisions must necessarily affect the ground, and there can none be more real than this, not only being a condition of the disposition, but also containing a clause irritant.

THE LORDS having first ordained the infestment to be produced, and finding that the sasine proceeded upon the precept in the disposition, without charter, being within burgh, the LORDS found that the provision could give no present access to the mails and duties, until the clause irritant were declared; or that it were declared, that they should have like execution by virtue thereof against the lands, as if it were in the hands of the first buyer, which the LORDS thought would operate, but had not the occasion here to decide it. See the sequel of this case, No 53. p. 2727.

Stair, v. 1. p. 394.

No 58.

If a procuratory of resignation is disposed by a father to his apparent heir, with the burden of provisions in favour of the rest of the children, whereupon the heir is

1673. *February 20.*

DAVID MORISON, Second Son the Laird of Dairsie, *against* HIS CREDITORS
Comprisers.

IN a double pointing raised at the instance of the Tenants against the said David and his father's creditors;—it was *alleged* for the said David, That he ought to be preferred to other creditors, because the lands and rights which they had comprised were affected with his debt of 10,000 merks, in so far as the disposition of the lands of Dairsie, bearing a procuratory of resignation made to Sir George his father who was common debtor, was assigned by him to his

eldest son, with express provision, that the fee in the son's person who was apparent heir, should be burdened with L. 40,000 to the rest of the children; likeas, the said procuratory, by a charter under the Great Seal, bearing expressly, that burden and provision; for fulfilling whereof, he had granted bond to the said David for 1000 merks, as his part of this provision in favours of the rest of the children, whereupon he had comprised. It was *alleged* for the rest of the comprisers, That they ought to be preferred, because the said David's right was founded upon a resignation, which did only bear a power to burden the said estate with the sums above written, which was but *mera facultas*, reserved to the father to burden or not as he pleased, and the father having contracted debts before he did grant any particular infeftment upon his obligation, he could not exercise that faculty thereafter to their prejudice, especially as to the father's liferent, which was expressly reserved out of the father's right and assignation made to his eldest son, containing the power to burden the estate in favours of his children, whereof he was never denuded before the creditors' comprising. It was *replied*, That it being lawful for fathers to provide for their children, and their provisions not being latent deeds, the same can never be reduced at the instance of any creditors for debts contracted thereafter. But so it is, that the father Sir George, when he had only right by a disposition and assignation, did assign the same in favours of the eldest son, with the burden of the provision to the rest of the children; and accordingly, this eldest son was infeft under the Great Seal, which was never *nuda facultas*, or a latent deed, but did affect the infeftment of fee, which was never in the person of the father, but in the son's, only affected as said is. THE LORDS did prefer the said David, and found, that the infeftment made by the father to his eldest son was not, by a naked reservation, to burden, in which case, before that faculty was exercised by giving of a real infeftment, the creditors having comprised for lawful debts, would have been preferred; but the assignation and infeftment made to the son being *per verba de presenti*, and a present binding of the fee, they found that it gave a right to the children for their provisions. But in respect that the father's liferent was reserved, both out of the fee made to the apparent heir, and the provisions made to the rest of the children, they did prefer the rest of the comprisers during the father's lifetime.

Fol. Dic. v. 2. p. 66. Gosford, MS, No 579. p. 322.

No 58.
infeft, the children will be preferred to all comprisers for debts contracted thereafter.

1676. December 13.

INGLIS against INGLIS.

MR CORNELIUS INGLIS having granted a bond to Mr John Inglis, for a sum due to himself, and for his relief of cautionries for the said Mr Cornelius, whereby he was obliged for his surety to infeft him in certain lands to be possessed by him, in case of not payment of the annualrent due to himself, and the report.

No 59.
Although a right was granted in consideration of undertaking to pay

No 59.

certain debts, the creditors were found to have no real right, but only a personal action.

ing discharges from the creditors to whom he was engaged, and whereupon the said Mr John was infeft by a base infeftment;

The said Mr Cornelius, in respect his son Mr Patrick had undertaken to pay his debts, did dispoise to him his lands, whereupon the said Mr Patrick was infeft by a public infeftment.

The said lands being thereafter comprised from the said Mr Patrick, and there being a competition betwixt the said Mr John Inglis, and diverse other creditors of the said Mr Cornelius and his son Mr Patrick, who had comprised the said lands from the said Mr Patrick, the LORDS found, that Mr John Inglis was preferable to the said other creditors, in respect, though their infeftments upon their comprisings were public and the said Mr John his infeftment was holden of the granter, yet the said Mr John's right was public as to Mr Patrick, in so far as the said Mr Patrick had corroborated the same, and before the said comprisings, had made payment to the said Mr John, of certain bygone annualrents in contemplation of his said right, and had taken a discharge from him relating to the same; so that his right, being public as to Mr Patrick, was public as to those who had right from him; and infeftments holden of the granter, being valid rights by the common law, and by act of Parliament and statute invalid only as to others, who had gotten public infeftments, in respect of the presumption of fraud and simulation; the said presumption *cedit veritati*, and in this case is taken away in manner foresaid.

THE LORDS found, that notwithstanding that the right was granted to Mr Patrick, upon the consideration foresaid, and for payment of the debt therein mentioned, that the creditors mentioned in the same, had not a real interest in the said lands, but only a personal action against the said Mr Patrick, in respect the said right was not granted to him for their use and behoof, neither was it expressly burdened with their debts; and therefore the LORDS did find, that all the creditors, both of the said Mr Cornelius and Mr Patrick, who had comprised within year and day, should come in *pari passu*.

Dirleton, No 399. p. 195

* * * Gosford's report of this case is No 50. p. 2119.; *voce* CAUTIONER.

No 60.

A disposition bearing, both in the procuratory of resignation and precept of sasine, this clause, that the receiver should be obliged to pay all the

1685. November. 19. LORD BALLANTYNE *against* ROBERT DUNDAS.

THE Lord Ballantyne being creditor to the deceast Lord Preston in the sum of L. 10,000, he intended action of reduction against Robert Dundas of Arniston, of a disposition granted by ——— Preston, son and heir to the said deceast Lord Preston, wherein he did insist upon the reasons following, viz. That the disposition was granted by the said Preston, within year and day after the de-funct's decease, to the prejudice of the pursuer, who was a creditor of the de-

funct's contrary, to the 24th act, Parl. 1. Cha. II. It was *answered*, That the foresaid act of Parliament did only discharge voluntary dispositions by the apparent heir, whereby he satisfied his own debt, and prejudged his predecessor's creditors, but that this disposition was for an onerous cause, viz. for payment of certain of the defunct's creditors, mentioned in a back-bond granted by the defender's father; and it was clear, both by the rubric and statutory part of the act, that it was only a remedy against the creditors of the apparent heir, but that it did not stop the apparent heir from disposing of the defunct's estate, for payment of his creditors, such as he thought fit. *2do*, That the defender's author, viz. the said ——— Preston, was not apparent heir in these lands disposed, he being infeft by virtue of a disposition from his father before his death; which infeftment, albeit it did bear, that the son should be obliged and liable to pay all his father's debts, contracted and to be contracted, sicklike as if he were served heir to the father; yet the son had thereby a qualified fee of the said lands, and neither needed, nor could be served heir to the father therein; and that it was so, was evident, seeing the foresaid fee did preclude all the King's casualties; so that neither ward nor marriage could fall by the death of the father. THE LORDS did not determine the first point, whether the apparent heir might dispose, for the satisfaction of any of his father's creditors within the year; but they found, that the defender, being infeft before his father's death upon the foresaid disposition, was in fee of the saids land, and so was not apparent heir therein.

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disponer's debts, contracted or to be contracted, was found to import only a personal obligation on the receiver to pay these debts, and not to affect the lands disposed.

Difference of these Expressions, "Obliged to pay the Father's Debts," and "With the Burden of the Father's Debts."

The pursuer's *second* reason of reduction was, That the qualification contained in the foresaid disposition, viz. That the son should be liable, and obliged to make payment of all the father's debts, contracted or to be contracted, being inserted, both in the procuratory of resignation and precept of sasine, was real, and did affect the lands disposed, although transmitted to the defender, who was a singular successor. It was *answered*, That the conception of the clause was but personal upon the son, being conceived in these terms, that the son should be obliged, and found liable for the father's debts, sicklike as if he had been served heir. THE LORDS found, that the disposition not bearing to be with the burden of the father's debts, although the clause was repeated both in the procuratory of resignation and precept of sasine, yet it did import no more than a personal obligation upon the son to pay his father's debts, but did not affect the lands in the defender's person, who was a singular successor.

Fal. Dic. v. 2. p. 66. P. Falconer, No. 101. p. 70.

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* * * Fountainhall reports this case.

1684. *December 18.*—THE question betwixt Lord Ballenden and Dundass of Arniston, about Sir Robert Preston's estate, was decided on Pitmedden's report. THE LORDS found Ballenden's inhibition null, served on a general charge to enter heir, because the debt was not specially condescended on in the general charge; though there was a summons after for payment on the said charge, wherein the said debt was liquidate and specific.

1685. *November 19.*—THE debate between Lord Ballehden and Dundass of Arniston, mentioned 18th December 1684, being reported by Pitmedden, the LORDS found, that John Preston was not in the case of an apparent heir, but a qualified fiar, under the provisions and obligations contained in the disposition made to him by his father, and so (notwithstanding the 24th act of Parliament 1661) he might sell and dispose on his lands within year and day of his predecessor's death, and that the disposition was not quarrellable on that head, the son being always infeft on the said disposition before his father's death; and found the provisions and obligations to pay his father's debts, albeit repeated in procuratories and infeftments, are but personal against John Preston the fiar, and not real against the fee.

1686. *February 16.*—THE Lord Ballenden's reduction against Preston and Arniston being debated in the Inner-house; the LORDS adhered to their former interlocutor, (*vid* 18th December 1684) finding the inhibition null, *quoad* the L. 300 Sterling bond, not expressed therein, because the leiges by such a general inhibition could never be certiorate what their debtors are owing, nor know how to contract with them. But as to that point, whether John Preston could dispoise within year and day of his father's death in favours of some creditors, and not of others, though by a former interlocutor (19th November 1685) the LORDS had found he might, being a qualified fiar, yet they demurred on it now, and ordained informations to be given in thereadnent; because the fee given him by his father bore with the burden of all debts contracted, or to be contracted, and that he should be liable in the same way as if he were to enter heir.

The third point represented against Arniston's disposition was, that it was from a nephew to an uncle without adequate causes; that by his posterior back-bond he had gratified some of the creditors to the prejudice of others who had done diligence; which was found unlawful, as Stair observes, 8th January 1669, Newman, No 2. p. 880.; 24th July 1669, Crawford, No 234. p. 1196.; and B. I. T. 10. This point was referred to the Auditor.

The fourth reason of reduction was, that the lands were *distincta tenementa* lying discontigue, and yet Arniston's sasine was only taken at the manour-

place of Gourton, and so could extend to no other, unless they proved an union, dispensation, or erection, into a barony ; and which was found relevant.

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1687. *November 23.*—THE Lord Ballenden's reduction against Dundass of Arniston, Stobs, and John Preston's other creditors, mentioned 16th February 1686, was reported by Edmonston ; and the LORDS thought the reason relevant on the act of Parliament 1621, that Arniston could not assume personal creditors before Ballenden, nor prefer any debts paid by himself since the disposition, but only those to which he had right at that time ; and therefore preferred Ballenden, who had inhibited, the rest, though his inhibition was found null *quoad* one of his debts. There was cited for Ballenden, this decision from Stair, Newman, No 2. p. 880. ; and Crawford, No 234. p. 1196. The words of the interlocutor were : The Lords found that Arniston by his back-bond could not prefer one creditor of Preston's to another but conform to their diligence ; but that as he might have received payment of all his own sums, so he might prefer himself as to all debts due to himself at the time of the disposition of the lands of Preston, or at the time of the disposition of the lands of Auchindinnie, which were both anterior to his back-bond ; and therefore sustain the reason of reduction at my Lord Ballenden's instance against Stobs, and the other creditors therein called, founded upon Ballenden's prior diligence ; and in respect thereof prefer him to them, notwithstanding of the preference given to them by the foresaid back-bond ; and ordain the Lord Ballenden to be ranked accordingly.

Fountainhall, v. 1. p. 322. 376. 403. & 481.

1687. *June 14.*

BAILIE MARJORIBANKS CREDITORS, Competing.

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IN the case of Alexander Chaplain writer, and Bailie Charles Charters, and other creditors of Bailie Marjoribanks, it was debated, that a clause in a disposition of a tenement of land, bearing in the procuratory of resignation, that it was with the burden of his other children's provisions, was only personal, and not real ; to which opinion the President inclined : Yet many of the Lords thought what was in any of these three clauses, viz. the dispositive clause, the procuratory of resignation, or in the precept of sasine, became a part of the real right : And accordingly the LORDS found it to be real, from the conjecture of a posterior clause, making it with the burden of any farther augmentation or provision to his bairns.

Fol. Dic. v. 2. p. 65. Fountainhall, v. 1 p. 456.

*** Sir P. Home reports this case.

1687. *July.*—JOHN MARJORIBANKS having disposed his estate to Joseph Marjoribanks his eldest son, with this provision, that his son should make payment

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to the children of the particular sums contained in their bond of provision, made to them of the date of the disposition, and reserving power to him, at any time during his lifetime, to burden his son and the lands disposed, with the payment of any further sums he should destinate for the provisions of his children, by bond, testament, or otherwise, or to change, alter, or innovate the disposition as he thought fit; and in a competition amongst the creditors for the rents of the lands, it being alleged for Bailie Charters, who had acquired right from the children to their bonds of provisions, that he ought to be preferred to other creditors, who had adjudged the lands after John Marjoribanks' decease, in respect that the disposition being burdened with the childrens' provision, they did really affect the lands, and so being a conditional real quality that affected the fee, it was effectual against singular successors and personal creditors that had done no diligence against the father the time of the granting the disposition; and in the case of the Creditors of Mowswell, No 11. p. 4102., where a father having disposed his estate to his eldest son, reserving power to himself to burden the lands with a sum to his other children, and having given them infestment for security of their provisions, the LORDS found the childrens' right preferable to posterior public infestments; much more in this case where the provision is not only the conditional quality of the right, but expressly inserted in the provision of resignation and sasine following thereupon. *Answered*, that all clauses contained in dispositions and infestments following thereupon, are not real burdens affecting singular successors, such as clauses of warrandice and of that nature; as also, if the infestment bear a provision, that the person infest should pay a sum, or perform certain deeds to a third party, this will import only a personal obligation upon the granter of the right and his heirs, and will not be sustained against singular successors; but much more in this case, seeing the particular sums is not exprest; and the case of the Creditors of Mouswell does not meet this case, because their right was expressly burdened with the childrens' provisions; whereas in this case the disposition did bear only, that the son should make payment to the children of their provisions, which did import only a personal obligation upon the son to pay the children, but was not a real burden affecting the lands. *Replied*, that whatever may be pretended in the case of personal provisions, such as clauses of warrandice and others of that nature, even in real rights, that these should not affect singular successors; but it is otherways when lands are disposed with an express quality and condition, for payment of a debt, or performing of a deed to a third party, in which case such causes do really affect the lands, and are effectual against singular successors, and are equivalent as if the lands had been expressly disposed with the burden of the same, and was decided Cuming against Johnston, No 57. p. 10234. THE LORDS preferred Bailie Charters, and found, that the clause in the disposition, for payment of the childrens provisions were real, and did effect the lands in prejudice of a singular successor.

Sir P. Home, MS. v. 2. No 936.

* * * Harcarse reports this case :

1687. February.—BAILIE MARJORIBANKS having disposed his estate to his eldest son, with a provision in the procuratory of resignation, that he, the son, should pay the younger childrens' bonds of provision ; the children having done no diligence against the eldest son, nor the father's estate, within three years after his decease, the son's creditors adjudged. It was *alleged* for the children in a competition, That the clause in the procuratory made the provisions a real burden and security upon the lands.

Answered, The clause being personal, obliging the son to pay, and not burdening the disposition or lands disposed, cannot be considered as real to prefer the younger children to the son's creditors, or the father's other creditors ; and it is ordinarily to cast in personal obligations in a procuratory of resignation.

THE LORDS found the clause not real, or burdening the disposition, and preferred the son's creditors.

It was thereafter *alleged* for the children, That by a posterior clause it was provided, that the disponent might further burden the lands with another sum, which imported, that the former provision was looked upon as a burden, upon which the interlocutor was stopped. And in June the contrary was found, viz that the clause made the childrens' provision a real burden.

Harcarse, (ALIENATION.) No 147. p. 31.

1714. June 30.

The CREDITORS of ROBERT ROSS of Auchlossin, Competing.

THE deceased Robert Ross of Auchlossin, having in the year 1702, disposed his estate to his eldest son Captain Francis Ross, with the burden of all just and lawful debts, whereupon the son was infeft ; and in the year 1707, several Creditors of both father and son, having adjudged his estate ; in a ranking and sale thereof, pursued by Robert Gordon, merchant in Bourdeaux, the Creditors of the father were preferred to the son's Creditors, in respect the disposition, charter and infeftment by the father, in favour of his son, is expressly burdened with the father's debts. But in a competition among the father's own Creditors, the LORDS found the Creditors who had adjudged preferable to those who had not :

Albeit, it was *alleged* for the Creditors who had not adjudged, That those who had used diligence, could not affect the said estate by their adjudication, but, as it stood in the son's person, which was, with the burden of all the father's debts, which being real, must still affect the fee and right, as it stood in the person of the son, though it went through never so many hands. And *quorsum*

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No 62.

The Lords preferred debts, with which a disposition and infeftment of an estate were burdened, to all debts upon that estate, contracted by the receiver of the disposition ; but preferred the preferable creditors among themselves, according to their respective diligence.

No 62. a preference to one of the father's Creditors, before another, seeing they were all equally secured by the son's infestment :

In respect, it was *answered* for the father's Creditors who had adjudged, That they ought to be preferred to such as have done no diligence ; because, the charge in the disposition, being only a restriction upon the son's right, and making no real right in favour of the father's Creditors, but only producing a personal action against the son, and that he could do no deed in prejudice of the said burden ; but it leaves the father's Creditors among themselves, as if no such burden had been, to be ranked conform to their diligence ; and this will be clear from a parallel instance, viz. the Creditors of the defunct, by the act of Parliament 1661, have a legal hypothec upon his estate, in preference to the Creditors of the apparent heir, provided the defunct's Creditors do diligence within three years ; yet, nevertheless, if some of these should adjudge, and others not, the Creditors adjudgers would undoubtedly be preferred, and carry off the estates.

THE LORDS gave this instruction to the Clerks, that bonds wherein Members of Parliament are co-obligants, may be registered in common form.

Fol. Dic. v. 2. p. 68. Forbes, MS. p. 72.

1719. July —. The CREDITORS of COXTON *against* DUFF.

No 63.

A DISPOSITION of lands being granted, with and under the burden of the payment of all the lawful debts ; it was contended, that this was only a personal clause, burdening the acceptor of the disposition, with payment of the debts, but not designed to make a real burden upon the lands. *Answered*, It is not presumed of any disponent, that he intends different things, when he says, with the burden of debts, and with the burden of payment of debts ; it is not disputed, but the first makes a real burden, and so must the other. THE LORDS found it a real burden. See APPENDIX.

Fol. Dic. v. 2. p. 66.

1729. February 18. GEDDES *against* YOUNGER.

No 64.

In a disposition by a father to a son, the question arose, if the father's debts were a burden upon the right, so as to be good against singular successors, or only a personal burden upon the disponent and his heirs ? In the dispositive part, the clause was worded thus, " likeas, by acceptation hereof, the said George binds and obliges him, and his foresaids, to make payment to my lawful creditors of all my just debts ;" and in the procuratory of resignation, " and the said George shall be obliged to pay to my creditors, my just and lawful debt, &c."

But in the clause of warrandice, it stood thus, " which right, I bind and oblige me to warrant from my own proper fact and deed, with the burden of my debts;" and in the precept of sasine, " under the reservation of my own liferent, and with the burden of my just and lawful debts." The father's debts were here found a real burden upon the subject disposed, and good against singular successors, though it was argued to be most express in the dispositive clause and procuratory, that this was a personal burden only upon the acceptor, and that the subsequent clauses must be understood of the burden, as described at large in the foregoing principal clauses of the writ; a personal burden being as truly a burden in its nature as a real burden. See APPENDIX.

Fol. Dic. v. 2. p. 67.

No 64.

1730. July —. CREDITORS of CALDERWOOD Competing.

CLAUSES burdening the subject disposed with the granter's debts in general, without mention of any particular debt, whether these debts become thereby real, debated, but not determined.

But thereafter it having been found in an appeal to the House of Peers, that such general clauses create no real burden; the LORDS ever since have been in use to determine according to the judgment of the higher Court. See APPENDIX.

Fol. Dic. v. 2. p. 67.

No 65.

1731. February 12. BARCLAY against GEMMIL.

A FATHER disposed his estate to his son, with the burden of 5000 merks to his creditors, " conform to bonds granted to them." After he was denuded, he contracted several debts, for which he granted infeftments of annualrents, upon the lands formerly disposed to his son. In a competition betwixt a personal creditor for 1000 merks, prior to the disposition, and these annualrenters; it was *pleaded, 1mo*, That, by the son's infeftment, the father was denuded, and had it not in his power to lay any new burden upon the estate, over and above what he had laid upon it in favours of his creditors, existing at the time of the disposition; and if the debts did not amount to 5000 merks, it was so much gain to the son. *2do*, Supposing this clause could be understood as a faculty, empowering the father to grant new securities upon the estate, so far as the 5000 merks was not exhausted by prior debts, still the debts, such as were existing before the disposition, were made real burdens upon the estate, equally as if they had been specially mentioned in the infeftment, which must prefer them to all posterior debts, though made real upon the estate by infeftment.

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No 66.

It was found, that no debts posterior to the disposition, could come in competition with the debts prior to the same. See APPENDIX.

Fol. Dic. v. 2. p. 68.

No 67.

1734. *July 5.* VISCOUNT of OXFORD *against* OFFICERS of STATE.

AN act of the fifth of King George I. entitled, An act for enlarging the time to determine claims on the forfeited estates; provides, 'That superiors shall be obliged to pay a proportional share of the true and lawful debts of the attainted persons, answerable to such estate, as shall be found to belong to them by virtue of the clan act.' Upon this clause, a competition arose betwixt the superior's personal creditors, affecting the rents by virtue of arrestments, and the personal creditors of the forfeiting person, whose estate it had been; in which competition, the creditors of the forfeiting person were found preferable, the estate being supposed to devolve to the superior, with the burden of the forfeiting person's debts, though not so expressed in the clause. See APPENDIX.

Fol. Dic. v. 2. p. 67.

1738. *January 10.*

CREDITORS of SMITH *against* His BROTHERS and SISTERS.

No 68.

IN a disposition of a land estate, by the proprietor to his eldest son, there was inserted the following clause; "as also these presents are granted, with the express burden of the payment of 8000 merks, which the said James my son, by acceptation hereof, binds and obliges him to content and pay to John, Gilbert, &c. my younger children, equally amongst them." In a competition betwixt the younger children, and the creditors of the eldest son, the question was, whether it was a personal burden only, or both a personal and real burden. The creditors *pleaded*, That there is a personal burden plainly established, and the clause does not necessarily import any thing further; and therefore, to found upon the same clause, as also inferring a real burden, which is a right of a quite separate nature, is truly establishing rights and conveyances, by conjecture and implication, contrary to the principles of law and of reason. THE LORDS, notwithstanding, found the above clause in the disposition made the provision real. See APPENDIX.

Fol. Dic. v. 2. p. 67.

1738. *July 25.*The CREDITORS ARRESTERS, of DOUGLASS *against* The LEGATEES of DOUGLAS.

No 69]

WHERE a grant was made of certain bonds, and of all other subjects belonging to the granter, and the said grant burdened with certain legacies to the persons therein named, these legacies were found to be preferable debts of the grantee to his own proper Creditors arresting the subjects.

Fol. Dic. v. 4. p. 68. Kilkerran, (PERSONAL AND REAL.) No 1. p. 383.

1739. *June 20.* CREDITORS of BROUGHTON *against* GORDON.

A FATHER having disposed his estate to his eldest son, in his contract of marriage, with the burden of his debts in general, as contained in a list or inventory therein referred to, the general burdening clause was also ingrossed in the procuratory of resignation, and the list registered in the books of Session.

It was notwithstanding, found, that the particular debts not being expressed in the contract, nor the list registered in the register of sasines and reversions, the said clauses in the contract and procuratory of resignation, did not render these debts real burdens upon the lands conveyed by the father to the son.

Fol. Dic. v. 4. p. 69. Kilkerran, (PERSONAL AND REAL.) No 2. p. 383.

No 70.
A disposition with the burden of debts contained in list, referred to in the disposition, does not make these debts a real burden, unless the list be recorded in the register of sasines.

* * * Lord Kames reports this case :

SIR DAVID MURRAY, in the marriage-contract of his eldest son Alexander, disposed to him the estate of Stanhope, with the following clause in the procuratory of resignation: " And further, it is hereby expressly provided and declared, and shall be provided and declared in the charter and infestments to follow hereon, that these presents are granted in favours of the said Alexander Murray, and the lands, baronies, tenandries, and others therein mentioned, are resigned with express burden of payment to the said Sir David Murray's Creditors, of the hail debts and sums of money due by him to them, and contained in a particular list and inventory of the said debts; as also, with the burden of payment to the said Sir David's children, of the respective provisions and portions granted by the said Sir David to them, all particularly set down in the foresaid list and inventory, subscribed by the said Sir David and Alexander Murrays, of the date of these presents." And this list was recorded in the books of Session.

Sir Alexander the son sold the estate, which produced a multiple-poining by the purchaser, as debtor for the price, and a competition of Creditors; and Mr Robert Gordon, having right by progress to the provision of one of Sir

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David's daughters, which was ingrossed in the list with Sir David's other debts, claimed preference for the following reason ; that though a general burden of debts is now no longer sustained as a real burden, yet that the burden in this case was made special by reference to the list of debts, which was put upon record. And, with regard to the children's provision, it was separately urged, that the names and number of these children being notorious, it was easy for the purchaser to purge the estate of those provisions, even without aid of the list ; that a disposition, with the burden of all debts in general due to a person named, would be deemed a special burden, because a reduction and improbation could force that person to condescend upon the debts due to him ; and that the present case, with regard to Sir David's children, is in effect the same.

" Found, that the clause in the contract of marriage, burdening the lands, baronies, &c. with the payment of Sir David Murray's debts, contained in a list and inventory thereof, neither expressed in the contract of marriage aforesaid, nor registered in the register of sasines and reversions, does not render the debts in question a real burden upon the lands, conveyed by Sir David Murray to his son Alexander, by the said contract of marriage."

Rem. Dec. v. 2. No 10. p. 23.

* * * This case is also reported by C. Home :

IN the year 1710, Sir David Murray of Stanhope disposed his estate to his son, Alexander (afterwards Sir Alexander) Murray, in his contract of marriage ; which contained, in the procuratory of resignation, the following clause :
 ' That these presents are granted in favours of the said Alexander Murray,
 ' and the lands, &c. therein mentioned, are resigned, with the express burden
 ' of payment to the said Sir David's creditors, of the hail debts and sums
 ' of money due by him to them, and contained in a particular list and in-
 ' ventory of the said debts ; as also, with the burden of payment to the said
 ' Sir David's children, of the respective provisions and portions granted by
 ' the said Sir David to them ; all particularly set down in the foresaid list and
 ' inventory, subscribed by,' &c. In virtue of the precept, Alexander was infeft in the 1715, with the burdens and provisions mentioned in the contract, and contained in the list and inventory therein referred to ; which list was registered *anno* 1717, in the common register of the Session.

In the year 1719, Alexander disposed the barony of Broughton (part of the said estate) to Mr John Douglas, who having died incumbered, the Earl of March, as apparent heir to him, brought a sale of these lands ; in consequence whereof it was sold by public roup before the Lords ; and the purchaser having raised a multiplepoinding, with respect to the price, there ensued a competition betwixt Robert Gordon, as assignee to a provision granted by Sir David to Anne his third daughter, contained in the foresaid list, and the Credi-

tors of Mr John Douglas ; wherein this question occurred, How far, in virtue of the foresaid burden in Sir Alexander Murray's contract of marriage, the children's provisions became real, and were thereby effectual against the debts and deeds of Sir Alexander, or those deriving right from him ?

Argued for Robert Gordon ; It is plain, from the conception of the clause, the provision to which he has right is really conceived ; it is inserted in the procuratory of resignation, and the lands are declared expressly to be resigned with the burden of the debts and children's provisions, conform to the inventory subscribed by Sir David and his son ; neither could any infeftment proceed, without reference to that list, or a purchase be regularly made, without the purchaser's getting up the list of debts with the progress ; so that he could not pretend ignorance of the extent of the burden therein contained. It is true, that general burdens, though never so really conceived, will not be sustained in prejudice of the disponent's creditors ; but special ones, imposed by the disponent upon the subject, are real, and give as effectual a preference to the persons interested therein, as if they had been infeft before the disponent's right ; and here there is, in effect, a special burden, by the reference to the subscribed inventory, which was registered two years before Mr Douglas's purchase.

On the other hand, it was *pleaded* for the Earl of March, and the Creditors of Mr John Douglas ; That they being singular successors, were not concerned to debate what effect the clauses in the contract, and arguments thereupon, might have against their author, Sir Alexander Murray, and his heirs, but that these could not affect them, because, *1mo*, By the tenor of the contract, the lands are disposed to Alexander, with the burden of these debts and provisions ; and he, by his acceptance thereof, is bound to relieve his father of the same, which is only personal on the disponent, whose faith the disponent trusted without reserving any real right in the lands ; *2do*, These debts and provisions are not at all specified in the foresaid contract, nor in the separate precept of sasine, granted in favour of Sir Alexander, nor in any infeftment, or others that followed thereupon ; but are only referred to as contained in a list, which is not at all repeated in any of the deeds aforesaid. A purchaser, or any transactor with the proprietor of a real estate, who is infeft therein, is not obliged to go further than the public records, to know the burdens that affect the said estate ; and, therefore, is not concerned with any reference not contained in the deed itself, nor duly recorded ; if it were otherwise, it would often happen, that the writs referred to could not be got, and then the reference in the recorded deed could signify nothing ; whereby the register would be imperfect, and lead one into a snare, or to insufficient knowledge of what it should sufficiently inform him of ; but, when one is not obliged to notice any thing ; but what is in the proper register, then it is his own fault if he suffer ; nor can it vary the argument, that the inventory is recorded, since it is only in the common register of the Session, but not in the register of sasines ; where,

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nevertheless, it must have been recorded, if to be sustained as a real burden on the lands whereon that sasine was taken; for it is only the register which people do, or are bound to search for that purpose, and with which the common register has nothing to do.

THE LORDS found the clause in the contract of marriage, burdening the lands, baronies, tenandries, and others, and the resignation therein mentioned, with the payment of Sir David Murray's debts, contained in a particular list and inventory thereof, neither expressed in the contract of marriage aforesaid, nor registered in the register of sasines and reversions, does not render the debts in question a real burden upon the lands conveyed by Sir David Murray to his son, Alexander, by the said contract of marriage.

C. Home, No 120. p. 191.

1748. June 3.

BEATSONS *against* BEATSON.

No 71.

A PERSON made a settlement of his estate upon his second son and his heirs, burdening him with provisions to his younger brothers and sisters. The eldest son had left the country, on account of the Rebellion 1715; but the father, by a special clause in the disposition of the estate, allowed it to be redeemable by certain persons for a rose-noble; and, in a separate deed, he named his eldest son, and two others for his behoof, to be the persons entitled to redeem it. The father died; the eldest son returned to the country; but without redeeming, took possession of the estate, in right of his apparenacy. The second son having ceded the possession, and accounted to him for the rents, got from him a disposition to a separate tenement. The eldest brother died without heirs, the second brother having predeceased him; upon which the estate was taken up by a son of the latter. The other brothers and sisters of the young man's father pursued their nephew for the provisions which were devised to them by the original settlement. The defender *pleaded*, That his father, indeed, might have been liable to make good these provisions, but that he did not succeed in the right of his father, being heir to his uncle, the elder brother, who was not liable for these provisions.—THE LORDS found, that these provisions were a burden upon the succession.

Fol. Dic. v. 4. p. 68. Falconer.

. This case is No 63. p. 2327. *voce* CLAUSE.

1749. February 10.

ELIZABETH MONTGOMERY, Factrix for M'VICAR her Husband, *against* COCHRAN and KER.

CRAWFURD of Fergushill, vassal to the Earl of Eglinton, in the lands of Hill and Megswell, sub-feued the same to James Cochran in 1697, at the yearly feu-duty of L. 24; and in 1726, Neil M'Vicar became purchaser from the heir of Crawford, with consent of the Earl of Eglinton, of the lands of Fergushill, and superiority of Hill and Megswell by disposition containing a clause of absolute warrandice.

When five or six years of the feu-duty had run on unpaid, Elizabeth Montgomery, as factrix for Neil M'Vicar her husband, brought a declarator of tinsel of the feu, *ob non solutum canonem*, on the 246th (250) act of the Parliament 1597, wherein she called the said James Cochran the vassal, and also Ker of Crummock; who stood infest in the lands upon an heritable bond, for a sum near the value.

Their defence was, That the sub-feu charter from Crawford, the pursuer's author, to Cochran, contained a disposition to the vassal of all and sundry the casualties of the superiority of the lands falling, or that may fall or become in the hands of the said Crawford, the disponent, or his heirs or successors, as superiors thereof, and that either as liferent escheat, non-entry, or by contingency of not timeous payment of the feu-duties therein specified; all which was also *verbatim* engrossed in the sasine following thereon.

Though this case differed, in several respects, from that determined between Nasmyth and Storry of Bracco, (*infra, h. t.*); as, on the one hand, in this case, there was no clause burdening the conveyance of the superiority to the pursuer, with the feu-right, nor no exception from the clause of absolute warrandice; and, on the other hand, the clauses in favour of the vassal in the feu-charter were not by way of obligation, but by way of disposition, and engrossed in the sasine; yet the general point was again resumed upon the Bench, How far the casualties could, consistently with the principles of the feudal law, be separated from the superiority; which, by a great plurality, it was thought they might, even such as were essential to the feu. Thus a feu-duty may, by the superior, be feued away to another, and was commonly granted by the Crown, till, by the act 239th (243) of the Parliament 1597, the *alienatio feudifirmæ feudifirmarum* of any part of the annexed property was discharged, and may, at this day, be granted by any subject superior: Neither could wards be taxed, if the casualty following a ward-holding could not be separated from it. And this the Court found, notwithstanding the answer made by those who appeared to be of a different opinion, that it did not follow, that, because a feu-duty could be given away, therefore a feu-charter might be granted, bearing, that there should be no feu-duty.

No 72.

A clause in a feu-charter containing a disposition to the vassal of all the casualties of superiority found effectual against a singular successor.

No 72.

But this point cannot be said to have received a direct decision, in respect of a distinction, which in this case occurred, to be made between such casualties as are essential to the feu, and such as are only introduced by statute; that whatever difficulty there might be as to the first, there could be no good reason assigned why the last might not be renounced; and such is this casualty of the feu's reverting to the superior *ob non solutum canonem*, as it had its rise from the act 246th, (250) Parliament 1597, before which statute it was not known in our practice without paction: And even when introduced by that statute, it is only declared to have the same effect, sicklike as if a clause irritant were specially engrossed in the infeftment of feu-farm; and as before the statute, such clause in the charter might have been renounced by the superior, *cum unicuique liceat juri pro se introducto renuntiare*; so the statute does, in that respect, make no difference, as it is a statute solely in favour of the superior, and to which, therefore, the rule does not apply, that *pactis privatorum non derogatur juri communi*; and which cannot be better illustrated than from the case of the statute 1685, concerning tailzies, which provides that irritant clauses, not inserted in the precepts of sasine, and procuratories of resignation, should not be effectual against creditors and purchasers; and which, therefore, as being in favour of the whole nation, cannot be dispensed with by any clause in the tailzie; but were there a clause in a tailzie, that the heir's not inserting the irritancies, &c. should not infer an irritancy of the heir's right, it would be effectual, though the creditors would be safe.

THE LORDS found the clause effectual against the singular successor.

Kilkerran, (PERSONAL AND REAL.) No 7. p. 391.

* * * D. Falconer's report of this case is No 9. p. 4180. *voce* FEU.

1750. November 21.

FRASERS against The KING'S ADVOCATE.

No 73.

An estate was disposed to an apparent heir, reserving powers to contract debt, and dispose of the rents. No infeftment taken. The estate was found to be still forfeitable in the person of the father.

SIMON, Lord Fraser of Lovat, tailzied his said estate to Simon his eldest son, and the heirs-male of his body; which failing, to Alexander and Archibald, his second and third sons, with other substitutions; reserving the liferent of certain lands; and also reserving 'the full power and liberty of administration and intromission over the whole estate during his life; and to contract debt, and grant security therefor, real and personal; and to grant feu-rights and wadset-rights of the same, and tacks, long or short; and to make such appointments concerning the rents, falling due even after his death, for the payment of his debts, as he should think fit; and to be sole tutor and curator to the heirs of tailzie, during his life, in the means and estate belonging to them, in virtue thereof, without being liable to account for his intrusions, or to find caution, or give up inventory; and with power to ap-

‘ point stewarts or factors, who should be accountable to him only during his life, and be discharged by him only.’

The Lord Lovat and Simon his son were both attainted of high treason, and my Lord executed ; and Alexander and Archibald his sons claimed the estate, as falling to them successively after the death of their elder brother the fiar, in virtue of the said tailzie.

Answered ; Notwithstanding the tailzie, on which no infeftment ever followed, the Lord Lovat continued fiar of the estate ; and by the conception thereof, he had the full powers of a proprietor over it ; and, therefore, it was forfeitable for his crime.

Pleaded for the claimants ; The powers reserved by Lord Lovat are in no respect equal to a property of the estate : The circumstances of his affairs, he being involved in debts, made it impossible to extricate himself, without large powers over the estate ; and to that purpose solely these are calculated : And he was undoubtedly obliged to apply his intromissions, and the debts by him contracted, to the debts upon the estate, to which also he reserved power of applying the rents, to fall due after his death : He might feu, and grant wadsets, but at a reasonable avail, and for an adequate price, and set tacks for a competent rent. This is a consequence of an accountable administration ; and there is no provision that he should not be accountable for his intromissions ; this is confined to his office of tutory and curatory over the heirs of tailzie when minors ; and he might have named other curators, with the same powers ; but the exercise of the powers reserved to him on their majority, are expressly for the payment of his debts ; or supposing he might, for onerous causes, have so exercised them, as to have alienated the estate, yet he could not by gratuitous deeds, or fictitious contractions, have disappointed the heirs of tailzie.

2dly, Whatever powers he might have over the estate, it was not in him an estate of inheritance, and powers and conditions confined to a person are not forfeitable, and cannot be exercised by the Crown in his name, especially after his decease ; and thus the act 33d Henry VIII. forfeiting conditions has always been constructed. The Duke of Norfolk settled his estate to the use of himself for life, and afterwards to the use of the Earl of Arundel his eldest son, with this provision, ‘ That if he should be minded to alter or revoke the said uses, and should signify his mind in writing, under his proper hand and seal subscribed by three witnessess, that then the uses should be revoked.’ The Duke was attainted ; and, Eliz. it was adjudged, ‘ That this proviso or condition was not given to the Crown by the act 33d Hen. VIII., because the performance of the same was inseparably annexed to his person,’ Coke’s Reports, Part 7. N. 13. Sir William Skelly made a feoffment, *anno* 23d Eliz. to the use of himself for life, with remainders in tail ; provided that if he, during his life, should tender a ring or a pair of gloves to any of the feoffees, or their heirs ; *ipso Gulielmo tunc declarante et expressante*, that the tender was to the intent to avoid the deed, that then the uses should be void, and the feoffee

No 73.

should stand seized to the use of Sir William and his heirs. Sir William was attainted, and the Queen authorised Sir John Fortescue to tender a ring; but it was judged 2d Car. I. *Harding versus Walter*, Latch, p. 25. 69. and 102. that the power of revoking the uses by this tender, was not forfeited to the Queen. Simon Main having right for a term of years to the rectory of Had- ingham, assigned it in 1643, in trust for himself for life, and afterwards for uses, provided, ' That if he were minded to change the uses, or otherwise dis- ' pose of the premisses, then he should have power so to do, by writing, or by ' his last will and testament ;' he was attainted as one of the regicides, but it was adjudged both by the Court of Common Pleas, and in the King's Bench, 23d Car. II. that the donee to this rectory had no title. There were two points agreed, *first*, That this was a personal condition, and not given to the King ; *2dly*, That if it were given, yet the same expiring by the death of Main, could not be performed after his death by the King, Hales, H. P. C. vol. 1. f. 246. Modern Reports, Part 1. f. 16, and 18. *Wheeler versus Smith*. On this occa- sion Moreton said, if it be objected that Main had, by this proviso, *jus disponen- di*, I answer, it is true he had a power, if he had been minded so to do; but it was not his mind and will; and Hales, that the proviso did not create a trust, but *potestatem disponendi*, which is not a trust. Sir Francis Englefield conveyed his estate to the use of himself for life, with remainder; proviso, that if he, by himself, or by any other during his natural life, did deliver or offer to the person in remainder a gold ring, to the intent to make void all the uses, then all the uses should be void. Sir Francis was outlawed, 18th Eliz. for high trea- son, and the attainder confirmed by Parliament 28th Eliz. It was ruled in the Court of Exchequer, that the Queen might, in the lifetime of Sir Francis, tender the ring; Coke's Reports, Part 7. N. 12. 33, and 34th Eliz. and a speci- al act was made, 35th Eliz. to confirm the forfeiture. Francis Englefield the heir in remainder, had been advised to sue for a writ of error; his counsel not being satisfied in the case, when he was prevented by this act; but the case has been always reckoned strict; and yet here was something special in the proviso, that the tender might be made by him or any other; and then it was only held it could be done during his life; and Hales, H. P. C. vol. 2. f. 245. says, if Sir Francis had died before the Queen had made the tender, then the condition had been determined; and it was found by the court of delegates, after the Rebellion in 1715, 18th March 1720, and 23d November 1722, that powers to charge debt upon an estate did not forfeit, in the cases of Perth and Niths- dale; and a bond revocable, as by husband to wife, not being revoked, was sus- tained to the Countess of Panmuir.

Pleaded for the Advocate, Lord Lovat was noways limited in the exercise of his powers to any purposes, nor accountable for his intromissions; and it is only the power of applying rents to grow due after his decease, that is restrained to payment of his debts; which debts however, might have been contracted any how after this disposition, so that he was real proprietor; the powers in him

characterised his right to be a fee; whereupon the estate would have been adjudgeable for his debt; and the nominal fee given to his son, to be of no more consequence than that it would save a service upon his death. As there had no infeftment past on the tailzie, these were powers which he had over his own estate, and were only to resolve into faculties over that of another, by expediting the infeftment; if it had been expedite, my Lord's interest was such, that it ought to be considered only as an infeftment in trust for his use; and uses are forfeited by 33d Hen. VIII. by the English law, as delivered by Lord Hales; the King is, in some cases, entitled to a condition of re-entry, belonging to the party, viz. not to the land itself, but to the benefit of the condition; which might reduce the land into the possession of the party attainted, and now to the benefit of the King. And Littleton, Coke Inst. 1. f. 201, saith, 'That an estate is called upon condition, because that the estate of the feoffee is defeasible; as if a man infeods another in fee-simple, reserving a certain rent on condition if the rent be behind, that then it shall be lawful to the feoffer to enter into such lands and tenements; and them in his former estate to have and hold, and the feoffee quite ouste thereof.' A feu-right by the law of Scotland, is precisely an estate on this condition, and other such there are, as wadsets. Hales explains, by a distinction, what conditions the King has the benefit of by forfeiture, viz. If the condition be such, as that the substance of the performance thereof is not bound up strictly to the person attainted; the conditions on which the several estates were defeasible in the cases cited by the claimants, were strictly bound up to the persons attainted; the estates were once put out of the original proprietor; who had it in his power to recal them, by performance of the condition; as in the Duke of Norkfolk's case, by a writing under hand and seal, subscribed by three witnesses; in that of Sir William Shelly, by his tender of the ring, *ipso Gulielmo sic declarante, &c.* in that of Simon Main by his declaration of his mind and will, in manner required; and in Sir Francis Engelfield's, though the condition was to be performed during his life, yet it was found not to be bound up in his person. Lovat's settlement was similar to none of these; the estate was not, after being out of him, to be recalled by performance of a condition; but he reserved in him the powers over it.

Replied, The claimants are not in a worse case, that there was no infeftment expedite on the tailzie; they have a personal right to the estate, and such was found sufficient to found a claim, in the case of Stewart of Grantully, on a minute of sale of part of the estate of Southesk; for though the Earl might afterwards have effectually disposed it; yet the King could only take benefit of what the Earl could have fairly and lawfully done. The heir of tailzie was entitled to have completed in him such a right to the estate as the tailzie would have conferred; and if that would have taken the estate out of Lord Lovat, so as not to have been forfeited by him, they are now well founded in their claim. The powers reserved could only be exercised by my Lord, and were

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as personal as the conditions in the alleged cases ; and particularly this settlement is precisely the same with that made by Simon Main, who putting the estate out of him, reserved *potestatem disponendi*. If the estate might have been adjudged for his debt, it proceeded from the contractions being an exercise of the power, which might afterwards have been made effectual by diligence.

Duplied, So long as there was no infestment, the estate remained in Lord Lovat, and came to the Crown by his forfeiture, and was rightly surveyed ; and the claimants could only pretend as creditors to take it again from the Crown ; this was a personal, or, as an English lawyer would express it, an equitable right ; but, on the other hand, there was in Lord Lovat an equitable right of disposing of the estate at his pleasure, which rendered it ineffectual ; and there was no equity that the claimants should now take from the Crown an estate forfeited by the Lord Lovat, over which the disponees never had any effectual right.

“ THE LORDS found the feudal and real right to the estate being in the person of Simon Lord Lovat, and he vassal to the Crown therein, at the time of his treason and attainder, and that notwithstanding of the personal right made to Simon Fraser his son, full power was reserved to Simon the father, to charge the estate with debts at pleasure, to alienate the same, by granting feu-rights and wadsets of the whole or part thereof, as he thought fit, and to apply the same to what uses he thought proper during his life, without being accountable ; that the infestment of property did remain in him for all these ends and purposes ; and that the real and substantial estate of fee and inheritance, did continue and subsist in the said Simon Lord Lovat ; and therefore was forfeitable for his treason, and was by his attainder forfeitable accordingly ; and therefore dismiss the claim.”

Art. R. Craigie, Ferguson et alii.

Alt. The King's Counsel. Clerk, Forbes.

D. Falconer, v. 2. No 166. p. 192.

No 74.

The annuitants of the York-Buildings Company had right to annuities to the extent of a certain sum, and security, by infestment for a smaller sum. Whether as the sum

1750. December 21.

The DUKE of NORFOLK against The ANNUITANTS of the YORK-BUILDINGS COMPANY.

It is enacted 6^{to} Geo. I. for enabling such corporations as should purchase estates forfeited by the Rebellion in 1715, to grant annuities forth thereof, ' That it should be lawful for bodies politic and corporate, as had purchased or ' should purchase any part of the said estates, to grant or settle rent-changes ' or annuities forth thereof : ' And it is enacted, 7^{mo} Geo. I. to enable the York Buildings Company, who had purchased several of these estates, to sell annuities by way of lottery, ' That it should be lawful to the said Company to grant

'rent-charges and annuities, to the full extent and value of such of the estates as were or should be at any time by them purchased, by the way of lottery; and for any person or body politick or corporate, by that method, to purchase annuities of the said Company.'

The Company having granted several annuities by the way of lottery, disposed, 13th October 1727, their estates to certain persons, 'for the use and behoof of the annuitants and their assignees; and for their further security, and more sure payment of their respective annuities belonging to them, as the same were particularly specified in a list or schedule under their common seal, of the date of that disposition; which was holden as therein repeated *brevitatis causa*;' and declared that it should not be in the power of the trustees, or any of them, nor of the annuitants or any of them, to enter to the possession of the lands, or to uplift mails and duties, unless upon default of punctual payment of the said annuities in terms of the bonds granted to the said annuitants. The schedule referred to, and which was annexed to this disposition, contained a list of annuities extending to L. 10,453 Sterling, though both the disposition and infestment thereon, and the schedule itself, mentioned the total sum as only amounting to L. 10,067.

The Duke of Norfolk and other postponed creditors of the Company, insisted in a reduction of the annuitants' right; wherein the Lord Ordinary pronounced the following interlocutors, 28th February 1749, finding "That the infestment in favour of the Trustees of the York-Buildings Company, was good and effectual to the extent of the sum of L. 10,067 therein mentioned, and no more, for the security of the whole nominees proportionally mentioned in the schedule annexed to the disposition; and therein, and in the *saine* taken thereon referred to; and further, that the said infestment was good and effectual, to secure the annuities of such of the several nominees or annuitants aforesaid, as from time to time survived those who deceased, since the granting thereof, and until they should recover full payment of their annuities." And 30th June, finding, "That the said infestment was good, and subsisted in the persons of the said trustees, for the behoof of the said annuitants, for securing to them their several respective annuities, until they and each of them should recover payment respectively."

By these interlocutors, though it was found the whole had only right to draw out of the estates the annual sum of L. 10,067, yet by as the death of the annuitants, this sum came to exceed the annuities due to the annuitants surviving, it was determined that the said sum might still be drawn, till payment of the arrears incurred on the full sum of L. 10,453, to which the severals in the schedule amounted, though erroneously calculated to less.

Pleaded in a reclaiming bill, Though this right is granted to a few in name, of the whole annuitants, yet no powers are granted to them; it is only a right executed in this form, to save the inserting a catalogue of names; and is not like as when an estate is disposed to trustees to be sold for the common bene-

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due was reduced by death of the proprietors within the sum secured, the infestment was a security for the arrears?

No 74.

fit; each of the annuitants has a separate real right, for a sum proportioned to his bond, as 10,067 bears to 10,453, and this is at an end by his death, and cannot encrease the real right of any other which was originally fixt by the same proportion.

Answered, The annuitants have right by their bonds, to L. 10,453 in security whereof they are infeft in L. 10,067, and though there can no more be drawn annually out of the estates, yet this sum remains payable while any part of the debt secured is due.

"THE LORDS found that the annuitants had a real right upon the estates disposed, for an annuity extending to L. 10,067, and no more; and found them preferable on the said estates for payment thereof; and found the subsequent creditors had not access to recover their payment, till after payment of the said annuity, and all arrears incurred thereon; and that then they had access."

Act. H. Home.

Alt. Lockhart.

Clerk, Gibson.

D. Falconer, v. 2. No 174. p. 208.

1753. November 21.

THE CREDITORS OF CARLETON *against* WILLIAM GORDON.

No 75.

While an entail remains a personal deed, and is made the title of possessing the estate, it will affect the creditors of the heir in possession, although it has not been recorded, and although the provisions, and irritant clauses have not been repeated in the title deeds of such heir.

IN April 1684, James Gordon executed a tailzie of his estate of Carleton, holograph. By this tailzie, he disposed the estate, and granted procuratory for resigning it in favours of the heirs-male of his own body; whom failing, to John Gordon, third son to Gordon of Earlston; whom failing, to Nathaniel Gordon of Gordonston, and their respective heirs-male; whom failing, to his own heirs-male whatsoever, &c.; under prohibitory, irritant, and resolute clauses, against altering the order of succession, &c. selling, &c. and against contracting debts, or doing any other deeds, directly or indirectly, above the half of the value of the estate.

The procuratory was not executed by the maker of the entail; neither was the entail recorded. The first substitute died before the maker of the entail; and both died without issue male. In 1702, Nathaniel Gordon the next substitute made up his title to the procuratory in the deed of tailzie, as heir male and of provision to the maker of the entail; and his retour contained the prohibitory, irritant, and resolute clauses; but he took no infeftment.

In the contract of marriage of Alexander his son, without taking notice of the tailzie, Nathaniel disposed, as absolute proprietor, the estate of Carleton to his said son, with the burden of his debts, &c.; but the son was never infeft.

The father and son having contracted debts above the value of the estate, and adjudications being led, and the legals thereof expired, the creditors brought a process of ranking and sale of the estate. William Gordon the defender, a

remote heir under the general substitution, appeared and objected, that the sale could not proceed; because, according to the prohibitory clause in the entail, the debts could not be sustained above the half of the value of the estate.

Answered for the Creditors; *1mo*, That the entail, though executed holograph in 1634, yet was not complete till 1688; for not till 1688 was the clause mentioning the date of the witnesses's subscription filled up. If so, the tailzie fell under the first clause of the act 1685, Jam. VIII. Parl. 1. Ses. 1. cap. 22. by which it is provided, 'that only such tailzies shall be allowed as are put upon the record;' but that this tailzie had never been put upon the record, so could not bind creditors.

Replied for William Gordon; The tailzie being holograph, was a complete deed in 1684, without witnesses. It was very true, that in the same year the maker, by an unnecessary anxiety, had owned his subscription before witnesses, who then subscribed; and the date of their subscription was filled in 1688. But all this operation was quite unnecessary. The tailzie, therefore, being a complete deed before the said act of Parliament, could not fall under it as to the necessity of recording.

Argued for the Creditors; *2do*, That supposing in general such a tailzie as this did not fall under the act of Parliament as to the necessity of recording; and supposing that upon common law deeds would be cut off where there was a prohibition to contract any debt at all; yet the case is different where the half or any part of the estate may be burdened; for as no register showed either the value of the estate, or when the half was exhausted, the creditors were *in bona fide* to go any length. The case is similar to that of a disposition of lands with a general burden of the disponent's debts, which would not stand in the way of the disponent's creditors.

3tio, As to the creditors of Alexander the son, they are further secured upon the second clause of the act 1685, which is extended to entails made even before its date, in so far as it appoints the provisions and irritant clauses to be repeated in the rights and conveyances of the heirs of tailzie, otherwise not to militate against creditors.

Replied for William Gordon; That creditors who contract with a person not infert, do so upon his personal faith, and not upon the faith of the records; and so every right, however latent, which affects the debtor, must affect his creditors; and it is believed that, in such a case, a disposition with a general burden of the disponent's debts, would bind the creditors of the disponent; or, what is more, a latent back-bond of trust, would do so as effectually as a trust expressed in the debtor's rights, or a back-bond registered in the register of reversions. This principle answers all the objections, whether of the whole creditors in general, or of Alexander's creditors in particular; and does so without distinction, whether the tailzie was made before or after the act; or whether any part of the act has a retrospect. For it is obvious the act of Parliament does not relate to the case, seeing it provides for the security of such creditors

No 75.

only who have contracted *bona fide* with the person infest. Upon this principle, in the case of the Creditors of West Shiel, where the entail was not recorded, and where the heir had made up his titles to the procuratory by a general service, without repeating the irritant clauses in his retour, the House of Lords reversed the interlocutor of this Court, and found, that creditors contracting with such heir not infest were bound by the entail. *See TAILZIE.*

"THE LORDS repelled the objection upon the act 1685; and found, that the heir in possession might lawfully contract debts to the extent of the half of the value of the estate."

Act. Macdual et A. Lockhart. Alt. R. Craigie et Tho. Hay. Clerk, Justice.

S.

Fac. Col. No 91. p. 138.

* * * Lord Kames reports this case :

JAMES GORDON of Carleton, executed a tailzie of his estate in favours of certain heirs, subjected to prohibitive and irritant clauses in common form, in order to prevent alienation and contracting of debt. Nathaniel Gordon, to whom the succession opened by the death of the entailer, made up titles by a general service as heir of entail; and after providing the estate to his eldest son Alexander, in the contract of marriage of the latter, without ingrossing any of the restraining clauses, he died without completing his titles by infeftment. Alexander turning insolvent, adjudications were led upon his debts; and the creditors reckoned themselves secure that the entail could not hurt them, because the irritant and resolute clauses were not contained in Alexander's right; which is required by the act 1685, in order to make an entail good against creditors. It was admitted for the next heir of entail, that the act 1685 does not militate against the creditors. But he objected, that the right being to this day personal, the creditors can be in no better condition than the person from whom they adjudged; and like him must be affected with the irritant and resolute clauses. By the common law of Scotland, a creditor or purchaser contracting with one who has only a personal right to lands, contracts at his peril; a latent back-bond is good against them, and *a fortiori* limitations upon the right engrossed in the title-deed itself. "And the LORDS accordingly found the prohibitory and irritant clauses were effectual against the creditors."

This judgment was pronounced without any debate upon the authority of former judgments of the same kind, and of a judgment of the House of Peers. I cannot justify in my own mind this opinion. I admit that the case comes not under the act 1685, but must be governed by the common law. Further I admit, that clauses qualifying a personal right, or qualifying the possessor's right, must be good against a purchaser, whether voluntary or judicial; because a purchaser cannot take more than what is in the disponent. But prohibitory and irritant clauses have no such effect as to qualify the proprietor's right, whe-

ther infeft or not infeft. It appears to me evident, that by the common law an entail is not good against creditors, even where the heir of entail is infeft; because a prohibitory clause does not limit the heir's right of property, but is only a personal prohibition, the contravention of which can go no farther than to subject him to damages, or perhaps to forfeiture. Now, if the possessor's right of property be not limited, every adjudication deduced against the estate for his debt must be effectual. This reasoning is equally applicable to the case of a person who possesses by a disposition without infeftment.

Sel. Dec. No 55. p. 73.

No 75.

1761. June 24.

ANDREW and JOHN CALENDERS *against* GEORGE WADDEL of Easter Mothal.

No 76.

Legacy given in a disposition to lands, by which the disponent and his heirs are burdened with payment of it, is a real burden upon the lands.

GEORGE WADDEL of Above-the-hill made a settlement of his heritable subjects in favour of several of his relations. In which, amongst others, he disposed "to Robert Waddel his brother, his heirs, and assignees, heritably and irredeemably, with the burden of the legacy under written to the person after-mentioned, all and hail the lands of Mothal, &c.; and the said Robert, or his heirs, by acceptation hereof, is obliged to pay to Margaret Waddel his niece, the liferent of 900 merks, and to her children equally amongst them in fee." This disposition contained a precept with this clause: "And I require you, that, incontinent thir presents seen, ye pass to the ground, &c. and give heritable state and sasine, &c. under the burden of the legacies above mentioned, to the said Robert Waddel," &c. In virtue of this precept, one infeftment was taken for all the different disponents.

The lands of Mothal were afterwards disposed by Robert Waddel, the original disponent, to William Waddel his second son, and by him they were sold to George Waddel the defender.

These two last mentioned dispositions made no mention of the legacy with which the lands were burdened; but, in the assignment to the writs and evidents in the disposition to the defender, the original disposition to Robert and the infeftment following upon it, are specially assigned.

The pursuers, the only surviving children of Margaret Waddel, brought an action of poinding the ground against George Waddel and his tenants, in order to recover payment of a balance of the 900 merks above mentioned, which still remained unpaid.

After the commencement of this process, the pursuers were present at sundry meetings of the Creditors of William Waddel the defender's author, where it was resolved, that William Waddel's lands of Ardrie-hill should be sold, and that the price should be divided amongst the creditors proportionally, who, upon drawing their shares, should be bound to grant discharges of their res-

No 76.

pective debts to the said William Waddel. At these meetings, articles of roup were read, containing a clause to the above purpose. To this resolution, the pursuers made no objection, and, in consequence thereof, drew a further payment of L. 21 : 17 : 6. Upon the 23d February 1757, the LORD ORDINARY pronounced the following interlocutor: " Having advised the memorial with the answers, the former minutes of debate, with the certificate by the minister and elders of the parish of Falkirk and justices of the peace, affirming, that Andrew and John Callenders, the pursuers, are the only surviving children of the deceased James Callender and Margaret Waddel his spouse, with the depositions of the two witnesses for proving thereof, and disposition by George Waddel to Robert Waddel his brother, wherein a legacy of 900 merks is settled to the said Margaret Waddel his niece, and her children in fee; finds that the same is made and granted *stirpi* of the body of the same Margaret Waddel, and that there is reasonable evidence, that the pursuers are the only children of the said Margaret Waddel, and issue of her body; especially considering, that the defenders do not pretend to aver or set forth, that there are any other children or issue of the said Margaret; and therefore repels the objection offered to the pursuers' title, and finds that the legacy not being to any particular persons, but to the children of Margaret Waddel's body of the fee of the sum to be liferented by her, the children existing at the determination of the liferent have right to the sums, without making up any title to any brothers or sisters that may have existed before that time, but are dead without issue: And further finds, That the disposition by George Waddel to his brother Robert, burdened not only the said Robert personally, but the right of the lands granted in his favour; more especially, that the precept of sasine, which is part of the disposition, and the warrant of the sasine, mentions, that the infefment is to be granted under the burden of the said legacy, and thereby subjected, not only the said Robert the first disponent, but also William his second son, to whom he disposed the lands with the burden of his debts, and likewise subjected George, the disponent of the said William, the rather, that, in the assignation to the writs and evidents by the said William to George the defender, the disposition wherein the said burden was imposed in favour of the pursuers by George their grand-uncle, as aforesaid, is specially assigned and delivered up; and therefore decerns in the pointing of the ground conform to the conclusion of the libel."

By several after interlocutors, the LORD ORDINARY adhered to the above judgment, with this variation, That the defender got credit for the sum of L. 21 : 17 : 6 Sterling, of which the pursuers had received payment out of the lands of Ardrichill.

Pleaded for the defender in a reclaiming petition, The pursuers were not the only children of Margaret Waddel existing at the date of the first disposition by George Waddel, or even at the time of his decease, when the disposition took effect; and the pursuers having received already more than their propor-

tion of the 900 merks, they are not entitled to the residue, until they are served heirs to the other children. The *jus accrescendi* is utterly inconsistent with the principles of the law of Scotland; and as the legacy vested in the whole children existing when the same became due, it is impossible that the fee can be taken out of them otherwise than by a service.

2do, The legacy left to the pursuers was not a real burden upon the lands, but was only personal against the donee; and consequently cannot affect the pursuer, who was a singular successor in the lands. For, from the words of the disposition, it appears, that Robert, and not the lands, are burdened, and he only, by acceptance of the lands, is obliged to pay. Nor do the words of the sasine, with and under the particular burdens and legacies in manner mentioned in the said disposition, and after the form and tenor thereof in all points, alter the case: These words do plainly neither make the matter better nor worse; and if it was only a personal burden in the disposition, it is made no better by the sasine. Besides, to have made this legacy a real burden, it ought to have been particularly mentioned in the sasine itself; for such general reference as this cannot by law create a real burden upon the lands, so as to affect singular successors; *vide supra, h. t.*

3tio, The pursuers, by being present at the meeting of William Waddel's creditors, and having acquiesced in the articles of roup of his lands, and accepted of their share of the price in terms of these articles, are barred from any further claim, as the articles expressly bear, That the creditors, upon receiving their proportions, should discharge their debts.

Answered for the pursuers, That the *first* plea maintained by the defender can have no other meaning than to put the pursuers to the needless expense of a general service, with a view to deter them, by the apprehension of that expense, from insisting further in this cause. But there does not appear to be any necessity for a service in this case; for it is clear, that the pursuers are the only surviving children of Margaret Waddel, and the only persons who have now right to the fee of the legacy; and from the conception of the clause in the disposition in which the legacy is left, the testator appears to have meant, that it should go to those children of Margaret who should be alive at her death, that is, as the expiry of the liferent, when the fee became payable.

Answered to the *second* defence, That as far as any disposition can be effectual towards constituting a real burden, so far is the respondent's legacy made real by the disposition of George Waddel. He appears evidently to have meant to make it a real burden upon the lands conveyed to Robert; and the words he has used are sufficiently strong and expressive of that intention. In the precept too, sasine is directed to be given under the burden of the legacies above mentioned; and the sasine itself is still more explicit, for it not only contains a narrative of the most material clauses in the disposition, but particularly with regard to the lands of Mothal; it bears them to have been disposed to

No 76. the said Robert Waddel, with and under the legacy also within specified. From all which it is clear, that this legacy is a real burden upon the lands.

Answered to the *third* defence, It is altogether irrelevant; for it is not so much as asserted, that the pursuers verbally even agreed to grant a discharge of their debt to William Waddel, or that they subscribed the articles of roup, in which that conditional obligation is said to have been contained; and surely their taciturnity upon that occasion cannot be binding upon them, as it is established law, that when a debt is constituted by writing, the extinction of it can only be proved, either by the oath of the creditor, or by a written discharge.

THE LORDS found the legacy of 900 merks a real burden upon the lands of Mothal and others: Found, That the pursuers, as the two surviving children, have right to two thirds of the said legacy; but found, that they cannot insist for the share of their deceased brother, without making up titles to him. Upon a reclaiming petition, the LORDS adhered.*

Act. William Baillie.

Alt. Wal. Stewart.

J. M.

Fol. Dic. v. 4. p. 69. Fac. Col. No 43. p. 93.

No 77.

A disposition though burdened with the whole debts of the disponent, not mentioning the names of particular creditors or the sums, did not create a real burden on the land, as to these.

1765. February 21.

STENHOUSE against INNES and BLACK.

JOHN STENHOUSE disposed his lands of Southfod to his eldest son John Stenhouse, with the burden of all his debts, and referring to an heritable bond granted by the son to him, of the same date, which mentioned the names of the creditors, but not the sums due to them.

John Stenhouse younger, having granted two heritable bonds over the lands to Isobel Innes and William Black, a competition arose between them and John Stenhouse elder.

John Stenhouse having claimed a preference for relief of his debts, in virtue of the disposition and heritable bond, the other two creditors *objected*, that the amount of the debts did not appear upon record, and that it was now fixed that general burdens are ineffectual against creditors and singular successors.

Answered for Mr Stenhouse; It is not necessary that the amount of the burden should appear upon record; it is enough that the record shew there is a burden, and direct the creditor or purchaser how to discover the amount of it: Hence it has been found, that a general reference in the sasine to the disposition where the extent of the burden is mentioned, is sufficient; Creditors of Smith, 26th July 1737.—*infra*, h. t.; Callenders *contra* Waddel of Eastermothal, 1761, No 76. p. 10261. Here the sasine upon the disposition refers to the heritable bond; and as that contains the creditors' names and de-

* In the Faculty Collection, the judgment is erroneously stated. The above are exactly the terms of it.

signations, singular successors, whether creditors or purchasers, have it in their power to learn the amount of the burden. The record is in the same situation in both cases ; the only difference is, that, in the present, the singular successor is obliged to go one step farther ; but the faith of the records being out of the question, that is but a light object compared with the defeating of the solemn contracts of parties.

" THE LORDS found, That the clause in the disposition granted by John Stenhouse in favour of his son, by which the disposition is burdened with the whole just and lawful debts then due by the father, without mentioning either the names or the sums due to them, did not create a real burden upon the lands disposed, *quoad* these debts ; and found, that the defect was not supplied by the heritable bond which was granted, of the same date, nor by the infeftment which followed thereon."

For John Stenhouse, *Rolland.*

For the Creditors of John Stenhouse younger, *Lockhart.*

Reporter *Coalston.*

Clerk *Pringle.*

A. R.

Fol. Dic. v. 4. p. 79. Fac. Col. No 11. p. 18.

1780. July 19.

JANET ALLAN, and her younger Children *against* The CREDITORS of RICHARD CAMERON, her eldest Son.

JOHN CAMERON, the husband of Janet Allan, executed bonds of provision, making considerable additions to former settlements on his wife and family ; and at the same time he likewise disposed his estate to his eldest son, Richard Cameron, under condition, " that Richard should pay all his debts, and make payment to Janet Allan, his well-beloved wife, of the different liferent annuities provided to her by contract of marriage and bond of this date, making in whole the sum of L. 100 Sterling ; and likewise to pay to the younger children the several sums provided to them in a bond of provision, of this date, executed by him in their favour."

The procuratory of resignation expresses " the burdens, provisions, &c. before written, here also held as repeated *brevitatis causa*, but nevertheless appointed to be ingrossed in the infeftment to follow hereupon ; otherwise the same, with all that can follow thereupon, to be void and null." And the same clause again appears in the precept of sasine.

The instrument of sasine accordingly specifies those burdens and provisions.

In the wife's bond of provision too, this declaration is made by John Cameron ; " with the payment of which yearly annuity I have burdened my real

No 77.

No 78.

A disposition not containing a special enumeration of burdens or warrant to infeft for them, did not render them real. Those here in question were provisions to a wife and children.

No 78. estate, disposed by me to Richard Cameron, my eldest son, by disposition thereof in his favour of this date, and relative hereto."

Richard Cameron, after the death of his father, became bankrupt; and a competition ensued, between his creditors on the one hand, and on the other, his mother, brothers, and sisters, who contended, that their respective provisions were real burdens on his lands, and entitled to a preference over his other debts. And, in support of that claim, they

Pleaded; From the expressions used in the disposition, and from the above-quoted declaration in the bond of annuity, John Cameron's intention of making the provisions in question real burdens on the subjects conveyed to his son, is clear and undoubted. Why then should effect be denied to it? Being specified in the instrument of sasine, the provisions are published by the records, and creditors or purchasers fully put on their guard.

It is true, a personal obligation upon a disponent is different from a real burden on the lands conveyed. But here is more than a personal obligation, an express order for ingrossing the burdens in question in the infeftment, sanctioned with the declaration, that the disposition should be otherwise void.

It is likewise admitted, that no indefinite or unknown incumbrance can be created on land. But though the wife's annuity only, and not the children's provisions, are expressed in the disposition, both are alike precisely specified in the infeftment; and therefore to this case that objection cannot be applied.

Answered; The disposition contains nothing more than a personal obligation on Richard Cameron, without imposing any real burdens on the subjects disposed. This could not be done without specially enumerating such burdens in the disposition or warrant of the infeftment, as well as in the infeftment itself, and declaring that the conveyance was granted only under them; Erskine, b. 2. tit. 3. § 49.; Bankton, b. 2. tit. 5. § 25. An effectual burden must be specially defined and ingrossed; and it must be *really*, and not *personally* conceived. None of these requisites, however, are complied with in this case; there being no specification in the warrant of infeftment except as to the widow's annuity, but only a reference to other deeds, which are personal, and contain no authority for taking sasine; for the instrument of sasine is to be regarded but as the bare assertion of a notary; February 21. 1765, *Stenhouse contra Innes and Black*, No 77. p. 10264.

That the obligation is merely personal, appears from the words in which it is conceived; and the order for ingrossing the provisions in the infeftment, or their being so ingrossed, can never alter their nature, which must still remain either real or personal, according to the original conception of them; Bankton, b. 2. tit. 5. § 25.

THE LORDS found, 'That the provisions to the widow and younger children were not real burdens on the estate disposed.'

To this judgement the Court adhered, on advising a reclaiming petition and answers.

No 78.

Reporter, *Lord Monboddo*. For Janet Allan and her Children, *Lord Advocate, MacLaurin*.
For the Creditors of Richard Cameron, *Ilay Campbell, Craig*.

S.

Fol. Dic. v. 4. p. 70. Fac. Col. No 118. p. 218.

* * * This case was appealed.

1781. *May 15.*—The House of Lords ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutor complained of affirmed.

1788. *January 14.* JOHN BALFOUR *against* PATRICK MONCRIEFF.

THE late Mr Balfour Ramsay was proprietor of the lands of Demperstone in fee-simple, while his wife, Mrs Anna Ramsay, held those of Whitehill under a strict entail, in favour of the heirs-male of her body, bearing the name and arms of Ramsay.

In order to preserve the representation of the two families, it was agreed, that Mr Balfour Ramsay should convey the lands of Demperstone to his second son, under an obligation to exchange them with his elder brother for the lands of Whitehill. These last the second son was to hold under the limitations of the entail.

The proposed exchange was effected soon after Mr Balfour Ramsay's death. The nature of the transaction was distinctly set forth in the disposition of the lands of Demperstone, in favour of Mr John Balfour, the eldest son. But in the charter under the great seal which followed, it was only stated in general terms, and in the instrument of sasine it was not at all mentioned.

Mr Balfour afterwards sold the lands of Demperstone to Mr Moncrieff, who refused to pay the price, on this ground chiefly, that if any of the sons of Mr Balfour, who were the proper heirs of entail in the lands of Whitehill, should at any time enter their claim, Mr Balfour's younger brother and his heirs might have recourse, in virtue of the real warrandice, against the lands of Demperstone. Mr Balfour, on the other hand, contended, that as the circumstances of the exchange did not appear from his infestment, those who purchased from him were perfectly secure. He

Pleaded, Nothing can affect a singular successor in landed property, which is not accurately pointed out in the records. Even where, from a registered sasine, it appears, that some limitation or incumbrance was intended, and where its nature and extent is precisely specified in the charter or other warrant for taking infestment, this is not enough, if it do not enter the infestment itself.

No 79.

Real warrandice, how far effectual against singular successors, if it be not specified in the warrantor's infestment.

No 79. The case of real warrandice is not an exception from the general rule. It has indeed been said, by some of our lawyers, to be effectual even against singular successors, if the nature of the bargain has been mentioned in the deed; but by this must be understood, such a writing or document as is inserted in a proper record for publication, or in other words, in the register of sasines, into which alone purchasers are obliged to look for discovering incumbrances on land. Without this, the boasted security of our records would prove a snare to those who relied on them; Bankton, b. 1. tit. 19. § 4.; Erskine, b. 2. tit. 3. § 51.; See 17th July 1706, Campbell *contra* The Creditors of Park, 27th November 1711, Lady Monboddo *contra* Haliburton, and other cases in Section 8. *b. t.*

Answered; It is true, that in consequence of various enactments respecting different deeds which are used for the transmission or burdening of landed property, no incumbrance can now be imposed on it by the agreement of parties, which may not be discovered on a proper search of the public registers. But there are many incumbrances, which, as they arise from the operation of the law, and without any positive agreement, must still be enforced in the same way as if these enactments had never been made. Thus, the rights of courtesy and terce, and in the same manner, the legal reversion of adjudications, although the two former do not appear from the infestment of the husband and wife, and although the last cannot, in general, be discovered from the adjudger's sasine, must ever be effectual against the lands. A right of real warrandice is precisely in the same situation. If the circumstances of the exchange appear in the disposition or other deed of conveyance, the party warranted has, by the act of the law itself, the same preference, in case of eviction, over every one laying claim to the lands originally belonging to him, as if the infestment in his person had never suffered any alteration; Erskine, b. 2. tit. 3, § 28.

A precise determination of the general question was here unnecessary, it being sufficient for Mr Moncrieff the purchaser's argument, to show, that the right given to him was of such a questionable nature, as justified his refusal to pay the price. But the case was thought by the Court to be attended with considerable difficulty; and it was only upon Mr Balfour's younger brother's agreeing to concur in the conveyance in favour of Mr Moncrieff, and thereby renouncing his claim of recourse, that, in a suspension of a charge for the price, "THE LORDS found the letters orderly proceeded."

Reporter, Lord Alva. Act. Rolland. Alt. Blair. Clerk, Sinclair.

G.

Fac. Col. No 13. p. 23.

1803. December 8.

WYLIE against DUNCAN.

No 80.

*Pactum de re-
trovendendo*
being personal,
not good
against a trustee
for creditors infest.

IN March 1800, Robert Archibald, baker in Glasgow, obtained from James Wylie, manufacturer there, a disposition of certain tenements in Glasgow, for payment of L. 450. Infestment was taken upon this conveyance, which was absolute and irredeemable, but at the same time a missive was granted by Archibald, narrating the sale of the subject, and engaging to re-sell it at the same price at any time, upon six months previous notice, and upon being allowed the expense of repairs and meliorations. This missive was of the same date with the disposition, but was not holograph of Archibald, and was attested only by one witness.

Notwithstanding this transaction, Wylie continued to possess the subjects as formerly.

Archibald's affairs having, in the course of the year following, fallen into disorder, his estate was sequestrated, and the trustee being infest, sold the subject as Archibald's property. Upon this, Wylie produced the missive-letter, and insisted that the transaction which had taken place between him and Archibald was not intended as a sale of the subjects, but merely as security for a loan, and that he was entitled to redeem the property upon payment of the sum. But the trustee disregarded this claim, and Wylie raised an action against him before the Magistrates of Glasgow, concluding that he should be obliged to re-dispose these subjects, upon payment of the original price, with interest, in terms of the missive. The Magistrates assoilzied, and the trustee completed the transaction with the purchaser, by executing a disposition in his favour.

Wylie then brought an action of reduction before the Court of Session of the decree of absolvitor pronounced by the Magistrates, and "the LORD ORDINARY having considered the mutual memorials for the parties, finds, That under all the circumstances of the case, and particularly as it is not denied that the pursuer, subsequent to his conveyance of the subject to Robert Archibald, continued his possession of the same as formerly, and that the term of redemption, as appearing from the missive, is unlimited, the presumption is, that the disposition was not intended as an absolute conveyance, but merely as a security for money lent, which was considerably short of the real value of the subjects: Finds, That whatever might have been the plea of onerous creditors of the disponent, contracting with him on the faith of a right apparently absolute to the subject in question, the trustee on Archibald's sequestrated estate is not entitled to urge that plea, but must take the subject disposed to him *tantum et tale* as it stood in the debtor's own person, and therefore subject to the same right of redemption; therefore, and before farther answer as to the merits, ordains Robert Archibald to depone on the verity of his subscription to the missive." The trustee reclaimed to the Court, and

No 80. *Pleaded* ; The right acquired by Archibald over the subjects was completed by a disposition and infeftment *ex facie* irredeemable, and is now vested in his creditors, who have contracted on the faith of the records. Although the creditors must take this subject *tantum et tale* as it stood in the person of their debtor, with respect to any real burden affecting it, they are not bound by any of his personal obligations. Even if the missive letter, upon which the pursuer rests his claim, were in every respect formal and regular, it cannot be binding on the creditors ; because, to constitute a real burden on lands in the person of singular successors, it is necessary, *1st*, That it be inserted in the investiture ; and, *2dly*, That it be expressed as a real burden on the lands, and not as a personal burden undertaken by the disponee ; Bankton, b. 2. t. 5. § 25. ; Erskine, b. 2. t. 3. § 49 ; Lord Ballenden against Dundas, Nov. 19. 1685, No 60. p. 10238 ; Allan against Creditors of Cameron, July 19. 1780, No 78. p. 10265 ; Stewart against Home, May 18, 1792, No 54. p. 10232. In such circumstances, a voluntary purchaser might have acquired a sufficient right from Archibald to the subjects in question, and the case of creditors is at least equally favourable with that of purchasers ; Stair, b. 1. t. 14. § 5. ; Erskine, b. 2. t. 6. § 32.

But even if a missive could be effectual in a question with creditors, it is in this case destitute of the statutory solemnities. It is neither holograph of the granter, nor does it mention the name of the writer ; it is not tested by two witnesses ; and it is neither addressed to, nor accepted by, any person whatever. Although such a missive might be binding *in re mercatoria*, the solemnities of the act 1681 are indispensable in writings regarding heritage ; Park against Mackenzie and Lawson, November 29. 1764, No 47. p. 8449 ; Sheddan against Crawford, July 6. 1768, No 48. p. 8456 ; Macfarlane against Grieve, May 22. 1790, No 51. p. 8459.

Answered ; The object of the parties in this transaction, was merely to create an heritable security to a certain extent over the subjects. It is evident there was no intention in the proprietor to sell, both as the sum paid was not equivalent to the value of the property, and as the original owner retained the possession. The disposition in favour of Archibald, and the missive granted by him to the pursuer, are component parts of the same transaction, and amount to nothing more than an heritable security in favour of Archibald, with the ordinary power of redemption contained in heritable bonds and dispositions in security.

But, even although the transaction were held not strictly to fall under the notion of an heritable security, it must be considered as a species of trust vested by the pursuer in Archibald ; and, consequently, in terms of the act 1696, he is entitled to prove the trust, either by Archibald's written declaration, or by his oath.

The trustee for a bankrupt's creditors can only hold that right or interest in the estate which belonged to the bankrupt himself. The act of bankruptcy

cannot create a new right, or make a conditional right absolute. The trustee must take the property *tantum et tale* as it stood in the person of the bankrupt; and if the property was subject to redemption, or was fiduciary in the person of the bankrupt, it must remain so in the person of his trustee; Mackintosh against Heriot, June 14. 1745, No 218. p. 1166.

No 80.

With regard to the objections to the regularity of the missive, it is not denied that the subscription is genuine, and, at all events, the pursuer is entitled to prove the verity of the subscription by the oath of the writer, so as to make the missive probative; Crawford against Wight, Jan. 16. 1739, *voce* WRIT; Neil against Andrew, June 8. 1748, *voce* PERSONAL and TRANSMISSIBLE; Edmonstone against Lang, June 23. 1786, *voce* WRIT. It was no objection to this mode of proof, that the granter of the missive is now bankrupt, Halkerston against Lindsay, February 26. 1783, *voce* PROOF. And although the letter is not formally addressed to the pursuer, there is extrinsic evidence that he was the person in whose favour it was granted.

THE LORDS, upon advising the petition, with answers, considered the burden as personal, and not good against the creditors. They therefore pronounced the following interlocutor: "THE LORDS having advised this petition, with answers, they alter the interlocutors complained of, and assolvie the petitioner from the action of reduction, and decern; and remit to the Lord Ordinary to proceed accordingly."

Lord Ordinary, *Woodhouselee*.
Alt. *Greensields*.

Act. *Monypenny*.
Agent, *R. Boyd*, W. S.

Agent, *James Smyth*, W. S.
Clerk, *Menzies*.

J.

Fac. Col. No 127. v. 281.

S E C T. VI.

Discharge of the Superior's Casualties.

1610. February 1. Sir GEORGE ERSKINE against LD. CRAIGIEHALL.

No 81.

IN the action of declarator pursued by Sir George Erskine, donatar constituted by Barnbougall to Craigiehall's liferent of the Lowchald, the LORDS found that the vassal's liferent fell to his superior, if the vassal were year and day at the horn before he were entered, and unrelaxed when he entered; that infestment given by the vassal-rebel, albeit before he were year and day at the horn, to him that bought his land, would not prejudice the superior of his liferent, if

No 81. he remained year and day at the horn, especially if the rebel retained possession. It was also found, That a gift granted by King James III. under his Great Seal, *in anno* 1474, to John Stewart of Craigiehall and his heirs, that whensoever his lands of Lowchald holden by him of Barnbougall, who held them ward of the King, or his lands of Craigiehall holden by him of Lord Seton, who held them ward of the King, should fall in the King's hands by the ward of his vassals, the same ward should pertain to the said John Stewart of Craigiehall and his heirs heritably; that that gift was now expired and null, and could only serve, at the most, during the lifetime of the King, giver thereof.

Fol. Dic. v. 2. p. 68. Haddington, MS. No 1776.

1679. November 19. The Lady BLACKBARONY *against* BORROWMANS.

No 82.

A clause in a feu-right discharging the feu-duties in all time coming, found not effectual against a singular successor in the superiority.

THE Lady Blackbarony being infeft in liferent, and her son John Murray in fee in the lands of Cringltie, pursues improbation and reduction against Borrowmans, of a feu-right of the said lands granted to them by umquhile Blackbarony, in which feu there is a clause, "discharging the feu-duties in all time coming," whereby the feu became null as wanting a *reddendo*, at least it ought to be declared, that the foresaid discharge could not be effectual against the pursuers, who are singular successors to Blackbarony, who disposed the superiority to Mr William Burnet, from whom it was apprised and adjudged, whereunto the pursuers have right and stand publicly infeft. The defenders *alleged* absolutor, because the discharge being contained in the body of the feu-right becomes a condition of the feu, which therefore becomes in effect blench; and though provisions in infeftments, to grant gifts of escheat *gratis*, be not effectual against singular successors, being but personal obligations, yet this discharge is no obligation, but a present passing from the feu-duty in time coming. It was *answered*, That if the discharge were effectual, it would necessarily annul the feu, which cannot subsist without a *reddendo*, nor can it be equivalent to a blench, which hath always a *reddendo, si petatur*.

THE LORDS found the discharge of the feu-duty contained in the feu, did not annul the same, but found that it was not effectual against singular successors, and that the pursuers had right to the feu-duty since they acquired right to the superiority notwithstanding thereof.

Fol. Dic. v. 2. p. 68. Stair, v. 2. p. 707.

No 83.

A discharge of 20s. Sterling payable yearly to a

1679. December 9. Lord HALTON *against* The TOWN of DUNDEE.

THE Lord Halton, treasurer-depute, being infeft in the estate of Dundee and Constabulary thereof, *cum feodis et emolumentis ejusdem*, pursues the Town of

Dundee to make payment to him of the sum of 20s. Sterling allowed to them in their Æque to the Exchequer in part of their burgh-mails; which Æque bear expressly this 20s. "*consuetis solvi annuatim* to the Constable of Dundee, or Lord or Viscount of Dudhope." The defenders *alleged* absolutor, *imo*, Because the pursuer produces no special constitution of this 20 s. as a part of the emoluments of the Constabulary, for the Æque bearing "a sum to be paid to the Lairds of Dudhope," it might be another right of pension, but not as Constable, neither can the generality of the infefment be made special by payment; for, though the Æque bears, "that this is accustomed to be paid yearly," yet that doth not import that it was truly paid, but it is only a designation of its being once paid to the Constable or Laird of Dundee; but the Town having gotten constant allowance of it, they have prescribed right thereto; *2do*, The Town produceth subscribed articles betwixt the Constable and Town of Dundee, whereby the Constable "renounces all right he had to this annuity." The pursuer *answered* to the *first*, That the emoluments of offices are ordinarily general, and possession doth only make them special; and here possession is clearly proved, in that the King doth yearly allow to the Town this annuity, "as used to be paid to the Constable of Dundee," who did pretend no other title thereto during all their payments, neither was it for any use for the Exchequer to call for the Constable's discharge, it being a constant annual allowance to the Constable, which if the Town had not paid, they were liable for it to him; and, as to the discharge, it could have only effect against the granter or his heirs, seeing no real right *aut jus fundi* can be transmitted by a discharge, which is only personal, and reacheth no further than the granter and his heirs, who being obliged to warrant the same, cannot come against it; but it hath no effect against singular successors, as is ordinary in superiors discharging of feuduties, but especially in this case where this annuity is due to the Constable by his office, and cannot be separated from the office without the King's consent; for if for any fault the Constable lost his office, his discharge would not be effectual against any other Constable not being his heir, nor doth it import that the Æque doth bear "sometimes the Lairds of Dudhope or Dundee," for unless a right could be shown to them distinct from the Constabulary, or that they got it when they were not Constables, law will ever presume that they had it as Constables, however they were designed in the Æque; for it being used to be paid to several generations of them, it cannot be presumed to be a pension, which is only personal, not reaching heirs; and though the words "used to be paid to the Constable" might have at first imported a designation, yet here it is constantly so continued, and sometimes bears *debitis et consuetis*, and doth not bear "of old, or some time due, or used to be paid to the Constables."

THE LORDS found the pursuer's title valid by his infefment, and made particular by the use of payment instructed by the Æque; but found that the Town's possession, qualified by their Æque, could import no prescription.

No 83.

Constable with a perpetual renunciation thereof, not relevant against the Constable's singular successor having right by apprising.

No 83.

except for the years preceding 40; and found that the Constable's discharge was not effectual against the pursuer a singular successor, having right not only to his gift of *ultimus hæres*, but by several apprisings.

Fol. Dic. v. 2. p. 68. Stair, v. 2. p. 718.

* * * Fountainhall reports this case :

IN the action Lord Halton, as Constable of Dundee, against the Town of Dundee, for payment of an heritable fee for many years bygone; *alleged*, They had a discharge of it from the Earl of Dundee. *Replied*, He was but an administrator, and could not prejudice his successors in the office; so that it may be drawn to a general point, whether one that has an heritable office (for in a temporary office, such as the Provostrie of Edinburgh, there will not be much doubt they cannot,) with a fee annexed thereto, (such as a Bishop's heritable Bailie or the like) can grant a valid renunciation and discharge of the fee of all years to come? "THE LORDS, after much debate, found he might discharge it, so as to prejudice himself or his heir, but not a singular successor deriving right from him; or who has apprised or adjudged it." And that, albeit an office is *jus incorporeum*, and is conveyed by a gift without any sasine or infeftment following thereupon. See in another law MS. the case of Montgomery of Langshaw, where the LORDS found a superior's discharge of feu-duties for years to come did not militate nor subsist against his singular successor*. Yet it may be *alleged*, Halton is an heir, coming in by his *ultimus hæres*, only he will call himself now a singular successor, and cloath himself with the apprisings; but he should not be permitted to invert the title by which he entered the possession, which was *qua* donatar to the *ultimus hæres*. Then it was *alleged* for the Town, That they could not be liable for that L. 20 of burgh-mail acclaimed by Halton as due to the Constable for his fial, *quoad* bygones, because they were *in bona fide* not to pay it, in respect of the former Earl of Dundee's discharge, and so they were *fructus bona fide percepti et consumpti*. "THE LORDS found they were not *bona fide possessores*; and therefore decerned for bygones."

Fountainhall, v. 1. p. 67.

No 84.

A superior by a writ under his hand, renounced and discharged in favour of the vassal all feu-duties and casualties.

1699. December 8. PRINGLE of Greenknow against The Earl of HOME.

GROGERIG reported Pringle of Greenknow against the Earl of Home, mentioned 20th Jan. 1698, *voce* SUPERIOR & VASSAL. Greenknow claimed absolutor from the 17 merks of feu-duty paid out of the lands of Rumbletonlaw and West-Gordon, and other emoluments of superiority due to the Earl as over-lord, and to be free from attending his courts and being thirled to his mill, because, by a writ un-

* See APPENDIX.

der the Earl's father's hand, he had renounced and discharged all these casualties. *Answered* for the Earl, None of these obligations can tie me, unless I represent my father, the granter; neither is a perpetual discharge of a feu-duty a *habilis modus* to extinguish it, nor is it real *contra fundum*, but merely personal upon the granter and his heirs; yea it is against the nature of a feu to discharge the recognizance and acknowledgment which the vassal owes to the superior; and it is *inter essentialia feudi* to have a *reddendo*; and to discharge it *in perpetuum* is equivalent as if it had none at all; yea, it will not so much as militate against the granter's successor for any years, but allenarly so long as the granter continues to have right to the superiority; for if he be legally denuded, then his singular successor may claim the feu-duty; neither will the discharge exclude him, reserving their recourse against the granter and his heirs. *Replied*, The Earl must be presumed to be heir, unless he instruct by what singular title he possesses; and till then he cannot quarrel his father's discharge. THE LORDS found, that *affirmanti incumbit probatio*, and seeing they libelled and replied on his representing, and that being their *medium concludendi*, they must prove it. If the Earl were pursuing his vassal, he behoved to shew his title; but in this process of declarator against him, he needed say no more but deny his representation, and if they succumbed, he would be assoilzied from this process; for the LORDS unanimously agreed that the foresaid perpetual discharge of the feuduties and other casualties and astringtion were merely personal, and only binding during the granter's lifetime, or his right, but could not operate against a singular successor.

Fol. Dic. v. 2. p. 68. Fountainhall, v. 2. p. 72.

No 84.
Found that
this was merely
personal,
and binding
only during
the granter's
life.

1731. December 11. Lady CASTLEHILL against Sir JAMES STEWART of Coltness.

A PROPRIETER having disposed part of his barony, holding blench of himself, became obliged, under a penalty, to enter the heirs *gratis*, and likewise to dispoⁿe *gratis* the liferent escheats of his vassals in these lands, so oft as the same should fall into his hands; this clause was not found real against singular successors in the superiority.

Fol. Dic. v. 2. p. 68.

No 85.

1734. July 24. GARDEN of Bellamore against Earl of ABOYNE.

IN an original feu-charter, though woods were disposed along with the lands, there was this remarkable restriction laid upon the vassal, "That it shall not be leisom for him or his heirs to cut, sell, or give away, any of the trees, but allenarly for their own particular use and their tenants;" but this clause did not

No 86.

- No 86. enter the sasine. The superior afterwards, by a personal deed, discharged the said restriction. The question occurred, If this discharge was good against a singular successor in the superiority? The singular successor *pleaded*, That the woods here were truly reserved, and nothing given to the vassal but the *usus*, and that a discharge could not transfer the superiority, or any of its accessories. The vassal *pleaded*, That he was infest in the lands and woods, and that the clause was no other than a restriction on his property, calculated that he might not interfere with his superior in the sale of his woods, to lower the price, by overstocking the market, and that restrictions may be discharged by any personal deed. THE LORDS found the discharge effectual against the singular successor.

Fol. Dic. v. 2. p. 69.

1740. December 17.

NASMYTH *against* STORRY.

No 87.

WHERE a superior had, by a clause in a feu-charter to his vassal, obliged himself, when any casualties should fall by reason of non-entry, liferent escheat, or any other way, to renounce and dispoise, and *per verba de præsenti* renounced and disposed the same and all profits thereof in favour of his vassal, his heirs and successors; this clause was found not to be effectual against singular successors; for, as there is no record of charters, singular successors could not otherwise be safe.

As to the effect of this clause between the vassal and the granter and his heirs, see SUPERIOR and VASSAL.

Fol. Dic. v. 4. p. 69. Kilkerran, (PERSONAL and REAL.) No 3. p. 383.

1748. November 8.

NASMYTH *against* STORRY.

No 88.

A SUPERIOR, in granting a feu-charter to his vassal, obliged himself, his heirs and successors whatsoever, to enter and receive the heirs and assignees of the vassal, without any other payment than doubling the feu-duty, and renounced for himself and said heirs all casualties that might happen to fall by non-entry or any other way. Another person having purchased the superiority, it was questioned, whether the above-mentioned clauses were real, and affected a singular successor; and if he could be obliged to engross them in a new charter, to be granted to a successor in the feu? The conveyance to the new superior contained a clause, excepting from the absolute warrandice the feu-rights and charters granted by the dispoiser and his predecessors, with which rights the conveyance was expressly burdened; but declaring, That this exception should import no ratification of these rights, which the disposee might quarrel and reduce on any competent ground of law. THE LORDS doubted much on the ge-

neral point of law ; but found, That in respect the new superior had accepted of the conveyance of the superiority with the burden of the feu, he was bound by every clause in the feu-right. This in effect implied a decision of the general question, at least as to the extent of the obligation ; for if the obligations upon the original superior were only binding on the granter and his heirs, they made no part of the feudal right, with the burden whereof only the conveyance to the new superior was granted ; and, for the same reason, the import of the exception from the warrandice also depended on the intention of these obligations ; for if it was no other than that they should be binding on the original superior and his heirs, they did not fall under the warrandice contained in a conveyance to singular successors.

Fol. Dic. v. 4. p. 71. Kilkerran.

* * Kilkerran's report of this case is No 96. p. 5722, *voce* HOMOLOGATION.

* * D. Falconer also reports this case :

1748. *July 5.*—ROBERT HAMILTON of Airdrie disposed the lands of Arbuckle to Claud Nasmyth in Nether Braco, to be holden of him feu, for payment of L. 7 Scots ; and afterwards disposed to him the said feu-duty, to be holden blench, for payment of a penny money, and relieving the disposer of 45s. Scots, as a proportional part of his feu-duty ; “ and further, so soon as the heirs of the said Claud Nasmyth should crave to be entered by him, or his foresaids, he bound and obliged him and his foresaids to enter and receive them vassals in the foresaid lands, to be holden free blench, for payment of the penny Scots yearly, and relieving him and his foresaids of the payment of the said 45s. at his superior's hands, in manner aforesaid ; likeas he altered the manner of holding of the said lands, from feu to blench in all time coming, and obliged him to grant to the said Claud Nasmyth and his foresaids all and sundry charters, and other writs requisite and necessary for their security thereanent.”

Claud Nasmyth was infeft in the feu-duty, as he had been in the lands.

The superiority came into the person of James Nasmyth of Ravenscraig, and the property into that of John Storry of Braco, both by singular titles ; and Braco being in non-entry, Ravenscraig brought a declarator against him, claiming the retour-duties, the holding being changed to blench ; to which it was *answered*, There was only an agreement to make the change, but it was never actually done by granting a feu-charter of the lands.

THE LORDS, 17th December 1740, (*see* No 87. *supra*) “ Found that notwithstanding the agreement betwixt the superior and vassal, for changing the holding from feu to blench, yet the lands held feu.”

This being fixed, a question arose about the tenor of the charter to be granted to Braco, in order to his entry ; the pursuer *contending*, That while the lands held feu, the conveyance of the feu-duty to the vassals was void, as being con-

No 88. trary to the nature of his right, as it would be to the nature of a tack to want a tack-duty; and so the Lords had found, that a perpetual discharge of a feu-duty was not good against a singular successor, 19th November 1679, Lady Blackbarony against Borrowman, No 82. p. 10272.

Answered, There was here a feu-duty, to wit, the L. 7 Scots which was not discharged, and there was nothing to hinder this from being separate from the superiority by disposition, as in church lands the King was superior, but the feu-duty was payable to the Lord of erection; the feu-duty here was disposed to be held by a separate tenure, and there was an infeftment upon it, which behoved to make the conveyance effectual against the purchaser of the superiority; nor could it make any difference, that it was granted to the vassal himself, who might hold it as well as another, and who indeed might alienate it without alienating the lands, in which case he would have a feu-duty to pay.

THE LORDS found, That the feu-duty of L. 7 Scots behoved to be insert in the feu-charter to be granted by the superior to the defender, payable to the superior, pursuer, or to the person who had or should have right to the infeftment, proceeding upon the disposition of the feu-duty by Robert Hamilton of Airdrie the pursuer's author.

Reporter, *Drummore*. Act. *R. Craigie*. Alt. *A. Macdougall*. Clerk, *Murray*.
D. Falconer, v. 2. No 270. p. 363.

S E C T. VII.

Effect of Fraud—of Force and Fear—of Simulation of a Gift of Escheat—of Spuilzie—of *Pactum contra Fidem*—of Minority—of Reduction *ex capite lecti*—of *Danatio inter Virum et Uxorem*—of Payment to an Adjudger.

No 89. 1617. February 28. EARL OF TULLIBARDINE against DALZIELL.

IN an action between the Earl of Tullibardine and James Dalziell, the LORDS found, that the exception of simulation of a gift of escheat, taken upon the expenses of the rebel, could not be opposed against the assignee, who being a creditor, had acquired the same to his own behalf, except it were proven that the assignation were also simulate.

Fol. Dic. v. 2. p. 70. Kerse, MS. fol. 543.

1622. July 6.

MURRAY against ADAMSON.

No 90.

SIMULATION of escheat cannot be opposed against a third party who acquires *bona fide*.

Fol. Dic. v. 2. p. 70. Kerse.

* * * This case is No 54. p. 3658. *voce* ESCHEAT.

1632. June 27.

CASSIE against FLEMING.

No 91.

ONE Cassie, relict of one Hamilton, cordiner in Glasgow, reducing a contract and infeftment of a wadset of a tenement in Glasgow, granted to Fleming by her husband and her, so far as concerns her consent to the alienation, she being conjunct fiar thereof, upon a reason of *metus causa*, alleging, that she was compelled to give her consent by her husband, upon just fear, she being beaten by her husband to the effusion of her blood, and menaced by him, and otherwise abused, and expelled out of his house, so that she behoved to consent; likeas, after her husband's decease, she revoked. This reason and qualification of fear, without that clause of the revocation, was found relevant and sustained, being *specifice* libelled, as was found necessary to be by the Lords, that the deeds libelled were done by the husband to her, for refusing to consent to this alienation, and for this cause expressly, albeit that, at the time of her subscription, she exprest no such cause of compulsion, and albeit the party, receiver of the wadset, knew no such compulsion, neither was the same ever intimated or signified to him, neither by the wife, nor no other, at her subscribing, or before, without which had been done, he *alleged*, that the reason libelled of *metus causa* could not be received against him, who had truly bargained with this party, and had really delivered to him the sums contracted for the wadset; and that it were against reason that he should be defrauded of his money, who had made a lawful bargain, and dealt *bona fide*, and was neither partaker of the violence enforced, nor cause of fear, neither knew thereof. This allegiance was repelled, and this qualification sustained; and thereafter the defender *alleged*, that she freely and voluntarily, of her own accord, gave her consent to the alienation, and received the money herself from the defender, never expressing any cause of discontent, but appearing to be well pleased therewith; and the pursuer opposing the reason of fear libelled, the deeds libelled being so done to her before her consent, that she behoved to consent thereafter, and durst not then express any contrary signification, so that she ought to have the prerogative of probation, the Lords found, that they would *ex officio* examine both the parties' witnesses, to be produced *hinc inde*, both anent the voluntary consent and coaction, and thereafter they would

A woman having consented to a disposition granted by her husband, it was found relevant against the dispoonee to elide the consent, that the wife offered to prove, that she was compelled by her husband.

No 91.

consider of the whole cause ; whereanent it is to be considered, that albeit, in these actions *super metu*, *talis metus* is required to be qualified, qui caderet in constantem virum, intelligitur vero metus et justus, qui etiam dicitur, quando res veresimiliter tendit ad metum, Bart. in L. Metum D. Quod metus causa ; is enim dicitur justus metus, qui dat causam restitutioni, *yet*, in muliere minor metus consideratur quam in masculo, quin et æstimandus est metus, etiam in viro, ex qualitate personæ, nam quidam potest metu affici et sic ad aliquod solvendum cogi, ex levi metu, qui tamen non caderet in virum constantem ; et quoad probationem metus probatur per indicia et presumptiones, sed hoc totum relinquitur arbitrio judicis ; et quoad exceptionem liberæ voluntatis notandum est, quod jura dicant, plus credi duobus testibus deponentibus de metu, quam centum de libera voluntate ; nam deponentes de metu, et violentia, attestantur de minis et tormentis, aliisque, quæ sensu corporis percipiuntur, et de mediis extrinsecis ; at deponentes de voluntate, dicunt de voluntate simpliciter secreta, quæ non tam aliorum sensibus subjacet, nisi et voluntas in actum aliquem eruperit, quæ per sensum dignoscitur, ut si actus factus sit in præsentia judicis, tum enim non præsumitur metus, tunc et quando est paritas terminorum, non est differentia circa fidem probationum de metu vel de voluntate, cum sic etiam per externa media, libera voluntas apparet : non est autem necessarium ut adhibeatur protestatio, ab eo cui metus infertur, de sic facta illi violentia et metu, sine enim ea protestatione actio procedit ; et cum ex quibusdam legibus protestatio videtur requiri, tum ex sola facta protestatione metus probatur, nec est opus alia probatione metus, sed si non sit facta protestatio, non negant illa jura, quin, probato metu, quis excusetur : metus vero purgatur ex libera voluntate, quæ post illatum metum expresse, vel ex aliquo actu deprehenditur, ut metus in promittendo tollitur, spontanea solutione facta ejus, quod fuit metu promissum, præsertim si interveniat temporis intervallum, inter metum et spontaneum postea factum, si ante spontaneam solutionem cessaverit causa metus ; nam durante et subsistente eadem causa metus, nunquam etiam cum intervallo, metus purgatur, ut in aliquo carcerato a communitate, quæ coegit carceratum ei præstare cautionem de certa summa communitati solvenda, quamque postea ille solvit liberatus etiam ex intervallo, non sic purgatur metus, nam durat causa, cum eum iterum communitas carcerare potuisset, nisi solvisset ; idem in uxore verberata a marito, quia nolebat consentire cuidam instrumento, si postea, licet ex intervallo consentit, videtur metu facere mariti, durante matrimonio ; et hic est fere idem casus, de quo inter partes hic expressas agitur : ita est apud Philippum Decium, de regulis juris, ad regulam, in omnibus causis 68 ; hæc autem actio datur in rem, et non solum in eum, qui vim intulit, sed in quemcunque alium, ad quem res pervenit, etsi non ipse, sed alius vim metumque intulit : Ut est in Wesembecio. ad Tit. Quod metus causa, Tit. 2. Lib. 4. D. et in legibus ipsis, hoc titulo. Idem in lege, Si vi 2. et L. Non-interest 5. Cod. eod. : at consideranda est dicta L. Si vi et L. Si per vim. Cod. eodem, quæ dicunt, pretium rei, quod datum est ei, cui metus fuit illatus, ut rem eo pretio venderet,

esse restituendum ei, a quo res petitur auferri, per hanc actionem, antequam restituatur : et hoc est notandum L. velle, 4. D. De regulis juris, quæ sic dicit, velle non creditur, qui obsequitur imperio patris vel domini ; nam licet coacta voluntas dicatur etiam voluntas, non est tamen proprie et simpliciter voluntas ; ea enim, ex libero mentis arbitrio, et proprio motu procedit, et non ad alterius petitionem : quare voluntas coacta, est voluntas qualificata, et secundum quid, quæque instante necessitate fit ; sic vero facta, non dicuntur in jure voluntaria ; quod enim fieri debet ex voluntate, non est imponendum ex necessitate ; L. Si per vim 4. Cod. de his quæ vi &c. requirit, ut actus æstimetur voluntarie factus fuisse, ut adhibeatur consensus ejus, qui dicitur compulsus, illi actui ex intervallo. idem authent. sive a me, sub. L. 21. Cod. ad Senatus Consult. Velleianum : ubi dicitur alienationem a marito, cum consensu mulieris factam, soluto matrimonio, illi non præjudicare, sed eam posse rem repetere, nisi duo concurrant. viz. nisi post biennium alienationi consentiat, et nisi aliæ res viro supersint, ex quibus illi plene possit satisfieri, alioqui licet frequenter consentiat mulier, non illa prejudicatur alienatione, quod et obtinet in alienatione rei dotalis ; et auth. si qua. Cod. eodem: dicit oportere constari pretium fuisse conversum in rem mulieris, ut et jura canonum, nullum consensum admittunt, nisi juratum ; ut cap. cum contingat. extra: de jurejurando : quod et convenit cum praxi, et legibus nostris, siquidem qui caute acquirunt rem, in cujus acquisitione requiritur uxoris consensus, solent coram judice hunc consensum adhibere, et juramentum ab ea exigere, consensumque hunc esse voluntarie præstitum ab ea, et non coactum, idque si ab illa præstatur extra viri præsentiam ; ita est in statuto, 83. P. 11. Ja. III. And this action, upon the 19th of July 1632, was so decided ; and the reasons of reduction *super metu* therein qualified, albeit long preceding the alienation, were sustained, and the exception of voluntary consent, albeit proponed for a wadsetter who was ignorant of the coercion, and alleged, that, at his contracting, she did willingly consent, which he offered to prove by the witnesses insert in his contract, was repelled. See VIS et METUS.

Clerk, Gibson.

Fol. Dic. v. 2. p. 69. Durie, p. 634.

1662. June 24.

WOODHEAD against BARBARA NAIRN.

WOODHEAD pursues Barbara Nairn, for the mails and duties of certain lands. The pursuer *alleged*, Absolvitor ; because the defender stands infest in liferent of these lands. It was *replied*, The defender's husband disposed these lands to the pursuer with her consent, subscribing the disposition. It was *duplicated*, The defender's subscription and consent was extorted, *metus causa*, whereupon she has action of reduction depending, and holds the production satisfied with the writs produced.

No 91.

No 92.

Found in conformity to Cassie against Fleming, No 91. p. 10279. *supra*.

No 92.

and repeats her reason by way of duply, viz. If she was compelled by her husband, it was by just fear; because she offered to prove by witnesses, that he threatened her to consent, or else he should do her a mischief; and that he was a fierce man, and had many times beaten her, and shut her out of doors; and offered to prove by the notary and witnesses insert, that at the time of the subscription, she declared her unwillingness.

THE LORDS found the defence and duply relevant.

Fol. Dic. v. 2. p. 69. Stair, v. 1. p. 113.

No 93.

1662. July 23.

LORD FRASER *against* PHILORTH.

It being *pleaded*, That payment made by the debtor is not sufficient to extinguish an infeftment upon an apprising *contra singularem successorem*; and that intromission with the mails and duties of the lands appraised has this effect by statute only, not by common law; this was repelled.

Fol. Dic. v. 2. p. 71. Stair.

* * * This case is No 62. p. 938. *voce* BANKRUPT.

No 94.

1667. December 18.

AUCHINLECK *against* WILLIAMSON.

REDUCTION upon the head of fraud is good against gratuitous acquirers, tho' not partakers of the fraud.

Fol. Dic. v. 2. p. 69. Stair.

* * * This case is No 243. p. 6033. *voce* HUSBAND and WIFE.

1672. July 16.

DUFF *against* FOWLER.

No 95.

A right granted by a son to his father, *contra fidem tabularum appositionis*, cannot be challenged upon that head in the person of a singular successor, purchasing *bona fide* from the father.

DONALD FOWLER of Culnald, in his son's contract of marriage, provides him and his future spouse to certain lands for their entertainment, during the father's life; but takes a tack from the son of the same lands, for a tack-duty far within the worth, which he assigns to his brother, and he transfers the same to William Duff, who pursues the son for mails and duties. The son *alleged*, *imo*, That this tack not being granted to assignees, the pursuer as assignee could not make use thereof, because tacks are *stricti juris*. It was *answered*, That life-rent tacks by many decisions are excepted from that rule, and that they do extend to assignees, if they be not excluded, though they be not expressed.

THE LORDS repelled this defence, in respect of the reply.

The son further *alleged*, That this tack is null, as being fraudulent *contra fidem tabularum nuptialium*; for the father having, by his solemn contract of marriage, provided the land to his son and his wife, during the father's lifetime, it was a most fraudulent deed to take a tack of the same lands, far within the avail, which was not known or consented to by the wife, or the contractors on her part, and is to the detriment both of husband and wife, as to their present subsistence.

THE LORDS found this defence relevant, if the tack was granted at the time of the contract of marriage, or any time thereafter before the marriage; and that not only in favours of the wife, as to her liferent, but as to both husband and wife as to their present subsistence.

And it being *alleged*, That this fraud could not extend to Duff as assignee for an onerous cause, who was not partaker of the fraud,

THE LORDS ordained the defenders to condescend if they could instruct that either Duff's right was without an onerous cause, or that when he took it he knew that it was contrary to the contract of marriage. See PERSONAL and TRANSMISSIBLE.

Fol. Dic. v. 2. p. 69. Stair, v. 2. p. 102.

. Gosford reports this case :

DONALD FOWLER in Inverness being provided by his father, in his contract of marriage with his wife, to the conjunct fee of a tenement of land, and the fee to the heirs of the marriage; at that same time the father did most fraudulently take a tack from the son during life, which he did assign to William Duff, who thereupon pursues his son to enter him to the possession. It was *alleged*, That the tack being purchased by fraud and circumvention by the father, *contra fidem tabularum nuptiarum*, it was *vitium reale*, and ought not to prejudice the wife and children, and in law is null, not only as to the father, but as to all right from him. It was *replied*, That the pursuer being an assignee for an onerous cause, unless it were proved that he were *particeps fraudis*, might not be prejudged of the benefit of the assignation.

THE LORDS did sustain the defence, notwithstanding of the reply; and found, that such fraudulent conveyances betwixt a father and a son, ought not to prejudice the wife and children; and that the assignation in favour of the pursuer being posterior to the contract of marriage, the pursuer must seek relief of the father, but could be in no better condition, as to the wife and children, than the cedent himself; fraud and deceit being *vitium reale* doth affect singular successors. The pursuer being assignee for an onerous cause, as to the rent of the houses, they found, that during his lifetime, he had right to pursue; and therefore decerned, unless the defender would allege, that he was *particeps fraudis*.

Gosford, MS. No 512. p. 271.

No 96.

1676. December 15.

INGLIS against LAURY.

AN assignation of an heritable bond by a wife to her husband, *stante matrimonio*, was found revocable, as *donatio inter virum et uxorem*, and that even against a singular successor, acquiring *bona fide* from the husband for onerous causes.

Fol. Dic. v. 2. p. 70. Stair.

* * This case is No 345. p. 6131. voce HUSBAND and WIFE.

No 97.

A donation by a wife to her husband, taken in name of a trustee, found revocable even against singular successors.

1677. July 17.

PATERSON against M'LEAN.

MARGARET PATERSON, by her contract with her first husband, being provided to six hundred merks yearly, she, with consent of her second husband, assigns her liferent right to Thomas M'Kenzie, who transfers the same to Sir George M'Kenzie advocate, who grants a back-bond, bearing, 'That his translation was for procuring payment to the wife and her husband of the liferent, except as to some debts due to the husband himself, and therefore obliges him to denude in favours of the husband, or any he would appoint.' The husband assigns the bond to Charles M'Lean, for security of a sum due by the husband to M'Lean, who thereupon pursues Sir George M'Kenzie to denude. The husband being dead, the wife pursues a reduction of this assignation, as being a donation by a wife in favours of her husband, which is null *nisi morte confirmetur*, and therefore is revocable at any time, during the life of the married person granter thereof, whether before, or after the death of the other. The defender *alleged*, That this reason is not relevant; *imo*, Because this is no assignation by the wife to the husband, but by both wife and husband to Thomas M'Kenzie, bearing, 'for causes onerous;' and it is beyond question, that a wife may not only dispone for causes onerous, but may gift her liferent right, in favour of a third party, without prejudice to the husband's *jus mariti* during the marriage; and if the husband consent, it imports his right by his *jus mariti*: And it is also unquestionable, that if the right be once so validly constituted, the assignee may transfer it to whom he will, even to the husband *qui utitur jure auctoris*; so that the wife can no more revoke it as to her husband, than as to a cedent. *2do*, Albeit the right were revocable, though not made to the husband, but to a third person for his behoof; yet if the husband or his trustee do transmit that right to a third party, for an onerous cause acquiring *bona fide*, the favour of commerce hath by positive law introduced, that the acquirer is secure, and the wife's power of revocation is not *vitium reale*, like theft or force affecting the matter *contra singulares successores*; for even fraud reaches not singular successors, *nisi participes fraudis*: So that M'Lean having gotten right to Sir George

M'Kenzie's back-bond, for onerous causes, he is secure; and the wife must pursue her husband upon her revocation, to make up her liferent. It was *answered* for the wife, That this being a just and necessary privilege for married persons, introduced by the Roman law, that at any time of their life they might revoke, and that upon a very good ground, *ne mutuo amore se spolient*. either party is secured against the insinuation of the other, which our custom hath constantly approved; and therefore it cannot be thought that the law can be eluded *per ambages*: So that it is alike to gift to the husband, or to any person to the husband's behoof; and in all personal rights, the assignee is in no better condition than the cedent, except as to his oath; as an assignee getting assignation to a clear bond, will yet be excluded by the cedent's back-bond or discharge, yea by compensation upon the cedent's debt, and will never be secured against the same upon the favour of commerce, though he acquire for a most onerous cause, *et optima fide*; so this privilege confirmed by law, is much more than a private back-bond: So that albeit the husband Sir George or Thomas' oaths were not competent against M'Lean the assignee to prove the trust, yet here the trust is clearly proved by writ, viz. Sir George M'Kenzie's back-bond to Thomas M'Kenzie the first assignee, bearing, 'the right to be to the behoof of the wife and husband, which back-bond being of the date of the assignation, granted by Thomas M'Kenzie to Sir George, and accepted by Thomas, it is not only probative against Sir George, but against Thomas the assignee acceptor of the same, who is as if he had subscribed the back-bond accepted by him; much more in this case, where M'Lean derives all his right from the husband, who had right from Sir George; so that M'Lean is excluded by the back-bond granted by his cedent Sir George, bearing the trust.

THE LORDS found, that the assignation made by the husband and wife to Thomas M'Kenzie, being to the behoof of the husband, was revocable, and is by this reduction revoked; and found the same to be proved to be to the husband's behoof, by Sir George's back-bond accepted by Thomas M'Kenzie; and that it was not a valid right *ab initio* in the person of Thomas the first assignee, returning to the husband *ut cuilibet*; but that it being in trust *ab initio* to the husband's behoof, it remains still revocable against all singular successors, against whom the trust were proved, by their cedent's writ anterior to their assignation or intimation; and therefore reduced the assignation by the husband and wife to Thomas M'Kenzie, and all that hath followed thereupon, except as to the years of the life of the husband who consented, whereby his right *jure mariti* was carried by his consent, and belongs now by progress to Charles M'Lean.

Fol. Dic. v. 2. p. 70. Stair, v. 2. p. 541.

1677. November 21.

HAY against LEONARD and Others.

No 98.

Spuilzie is a *vitium reale* as well as theft, and equally competent against singular successors.

JAMES HAY pursues John Leonard for spuilzieing from him a pearl worth 9000 merks, and David Carnegy and others, as havers thereof, for restitution. It was *alleged* for Leonard, Absolvitor; because he offers him to prove, that the pursuer and he entered into a co-partnery for getting of pearls in the water of Southesk, and that they got several pearls, which were all in the pursuer's custody, and having shewn the defender the pearl in question, and given him it to see, and demanding it back, he refused, as having equal interest in it, until a division of the whole pearls were taken. It was *answered*, That this defence is contrary to the libel, expressing violence. THE LORDS sustained the defence, unless the pursuer be special in the violence. It was *alleged* for Carnegy, That he had bought this pearl as a merchant, and had no accession to any violence, and therefore cannot be obliged to restore, even though it had been violently spuilzied; for though theft be *labes realis*, that is effectual against every singular successor, yet that hath never been extended to spuilzie, and it is of public interest to secure commerce, in purchasing of moveables, which neither hath nor requireth writ, and therefore no person can be obliged to dispute the seller's right. The pursuer *answered*, *imo*, That whatever the law extendeth as to theft, must much more be extended to spuilzie, which is robbery. *2do*, Albeit the law hath allowed the purchase of moveables for an onerous cause to be valid, without necessity to prove the purchaser's author's right, which is presumed from lawful possession, so that it will not be sufficient to procure restitution, to libel that the goods in question belonged to the pursuer, and were in his possession as his proper goods, unless the pursuer do also condescend, that the goods could not pass from him by sale, or any other title of commerce, but that they were stolen, strayed, given in grasing, or custody, or that they were in a defunct's possession the time of his death; all these take off the presumption of right by possession, and much more when the pursuer condescends that the goods in question were violently taken from him.

THE LORDS sustained the first reply, and found that spuilzie was *vitium inharens* as well as theft; but found, that if no spuilzie were proved, but that a co-partnery were proved, the buying from one co-partner did secure the buyer against the other, and left him to pursue his co-partner *actione pro socio*.

Fol. Dic. v. 2. p. 69. Stair, v. 2. p. 561.

1683. November.

ANDERSON against SPENCE.

No 99.

In a pursuit against a minor upon his bond, the defender having founded upon

minority and lesion,

It was *alleged* for the pursuer; That though the benefit of restitution might take place in things disposed, whereof a minor might have *rei vindicationem*, as goods, lands, &c. yet it cannot be effectual against successors to *nomina de-*

bitorum for onerous causes, as the pursuer is, because that would make a great interruption in commerce. *2do*, The minor being a merchant, and the bond granted in relation to trade and merchandise, he cannot be restored.

Answered for the defender; Minority is *exceptio realis* competent to heirs against singular successors; for otherwise, the creditor would always assign, and so disappoint the benefit of restitution in the case of the cedent's insolvency. Nor is the argument from the favour of commerce of any weight, seeing assignees rest secure upon the cedent's warrandice; and the same objection might be made if the cedent had discharged the bond before assignation; which discharge would certainly meet the assignee. *2do*, The defender was circumvented by the pursuer's (cedent) in the stating of their own accompts. *3tio*, The bond was extorted by force, the pursuer's (cedent) having threatened to put the defender in the correction-house, unless he signed it.

Replied for the pursuer; That the personal qualification of circumvention used by the cedent cannot be obtruded against the pursuer, who is a singular successor for onerous causes. *2do*, The reason of *metus*, as it is qualified, is not relevant: For as the cedent might have used legal execution against the defender, he might have threatened him with it. And though deeds done under the terror of legal diligence do not infer homologation, so as to cut off the granter from his defences against the debt, such securities are not null, nor infer *justum metum*; and consequently labour under no *vitium reale*, which can overtake singular successors for onerous causes.

THE LORDS found, That the qualification of circumvention was only personal; and also repelled the defence of *metus* as qualified, in so far as concerned the pursuer a singular successor; and the rather, because the cedent was sufficiently solvent, against whom the defender might have recourse.

Fol. Dic. v. 2. p. 70. Harcarse, (MINORITY.) No 707. p. 199.

1697. December 18.

LIVISTON against BURN and LIVISTON.

In the reduction of a disposition pursued by Michael Liviston of Bantaskin against Burn and Liviston, *ex capite lecti*; it was *alleged*, That the defender was not the immediate receiver of the disposition, but a singular successor for onerous causes, having purchased it from him to whom the same was made, and so was not bound to enquire whether it was *in lecto* or not; and so, though the deed might be quarrellable and reducible *quoad* the receiver, yet not against him, a third party, who knew nothing of its defects: And urged the parallel of the act of Parliament 1621, that singular successors obtaining rights from bankrupts for onerous causes, and not being *participes fraudis*, were only liable in the price. *Answered*, This was never contraverted but a right made on death-bed might be reduced, though it passed through twenty hands, because it was *labes realis*, like extortion *per vim et metum*; but the exception on the act of Parl. 1621 was personal. And the LORDS found it so in this case, and reduced.

No 99.

minority and lesion; the Lords found, that the qualification of circumvention was only personal.

No 100.

The Lords reduced a disposition done *in lecto*, as being *labes realis* though the defender was a singular successor, ignorant of the circumstance.

No 100. the disposition made *in lecto*, and consequently, the defender's right flowing therefrom by progress, though he was a singular successor, and knew nothing of its being done *in lecto*.

Fol. Dic. v. 2. p. 70. Fountainhall, v. 1. p. 803.

No 101. 1698. December 14. COUNTESS OF ROTHES against FRENCH.

IN a competition betwixt the Countess of Rothés and David French, creditors on the estate of Edmiston of Carden, the LORDS found a clause in a disposition, bearing, that it was given and accepted with the burden of a sum to be paid to another, is not merely personal, but real against any who succeed in that right; as also, found, that an apparent heir buying in a comprising on his predecessor's estate, it is not only redeemable from him within the ten years, in so far as it is not extinct by intromission, conform to the 62d act of Parliament 1661, but likewise the reversion operates against the apparent heir's creditors and singular successors, who have adjudged his right; for whom it was *alleged*, The act run only against the apparent heir himself; but the LORDS repelled this, and found it a real exception. They did not here determine *a quo tempore* the ten years began to run, whether from the date of the acquisition, or the infeftment or other deed, making the conveyance public, else it might be kept up latent till the ten years were run, though this was touched in the debate.

Fol. Dic. v. 2. p. 66. Fountainhall, v. 2. p. 25.

No 102. 1728. January 25. GOURLIE against GOURLIE.

REDUCTION upon minority and lesion found not good against onerous singular successors. See APPENDIX.

Fol. Dic. v. 2. p. 70.

1744. November 8.

COUNTESS of CAITHNESS, and LADY DOROTHEA PRIMROSE, and the CREDITORS ADJUDGERS from the EARL of ROSEBERRIE, Competing.

No 103.

In what cases exceptions competent against the debtor are competent against the adjudger from him.

THE deceased Archibald Earl of Roseberrie disposed all his lands and other heritable subjects, excepting his entailed estate, as also his whole moveables, in favour of his four younger children, John, and the Ladies Mary, Margaret, and Dorothea, equally amongst them. But as the granter was by every body believed to have been upon death-bed at the date of this deed, and had also left great debts, the younger children transacted with their brother the now Earl of Roseberrie, renouncing the foresaid disposition, and accepting of a certain provision in full of all they could ask in and through their father's decease.

But as the Ladies Margaret and Dorothea were minors, and the Earl their brother was their curator at the time, this transaction was, so far as concerned their interest, thereafter reduced. And as, by that time it came to be discovered, that, subsequent to the date of the disposition by the late Earl, he had been seen walking at the Cross of Edinburgh at mid-day, where there is a constant market, by stands, &c.; they, upon a proof thereof, prevailed in a declarator of *liege poustie*.

While the transaction stood, the present Earl had made up titles as heir to his father, and disposed of great part of the heritable subjects; and the purchasers were safe. But as there were still certain of the heritable subjects remaining *in medio*, affected with adjudications at the instance of the present Earl's Creditors, the said Ladies, Margaret and Dorothea, brought a declarator, wherein they insisted to have it found, that the Earl their brother having intromitted with more than the half of the heritable succession which belonged to him in the right of John and Lady Mary, the whole that remained belonged to them the pursuers.

But the LORDS found, "That, in competition with the Earl's Creditors who have led adjudications, the pursuers could have no preference upon heritable subjects still extant undisposed of, for more than their equal half of these particular subject."

As the Earl became debtor to the pursuers by his disposing of more than his own half, he would have been *personali objectione* barred from any interest in the extant subjects. But as the Earl was not creditor to the pursuers in any thing, but joint proprietor with them in the subjects in question, and that his interest of property was not *eo ipso* extinguished by his becoming debtor, the adjudgers from him could not be affected by the personal exception competent against him. For the maxim, that every exception competent against the debtor, is competent against an adjudger, holds only true of objections of extinction; those and those only competent against the cedent, are competent also against the assignee; but every exception that may hinder the cedent to draw, will not be competent against the assignee.

And, whereas it was urged by some, from the analogy of the *actio familiæ erciscundæ* in the Roman law, that one of the heirs having got his share out of any subject, neither he nor his creditors had any further claim; the answer was, that the system of our law is in that very different from the Roman law; for that with us there is no such thing as the *actio familiæ erciscundæ*, which among the Romans proceeded upon the notion of the *hæreditas* being an *universitas*, without regard to the difference between heritable and moveable subjects, and of a *quasi* contract among the heirs, that any one's intromission with any subject, should impute in his part of the *universitas*; and as every thing was allodial, it made no odds, whether one of the heirs got one subject equal to his share of the whole, or his share of each subject; a notion very different from ours, who have no other action for division among heirs, but that of *communi dividendo*, as the heirs portioners succeed each to a share of each indivi-

No 103.

dual subject, insomuch that it is not in the power of the Court to adjudge one subject to one, and another subject to another. Suppose the heritage to consist of lands of different holdings of the same or of different superiors, each of the superiors must have each of the heirs his vassal, and that in the several holdings, who again must separate their interests by a brief of division, which is the *actio communi dividundo*; and this being the system of our law, one's intronitting with more than his share of one of the subjects can never extinguish his interest in the other.

Kilkerran, (PERSONAL AND REAL.) No 4. p. 384.

1750. February 17. and June.

DEMPSTER against DAME ELIZABETH NEVAY, Widow of SIR JAMES KINLOCH.

No 104.

Infestment for a greater sum than was advanced at the date.

IN the ranking of the Creditors upon the forfeited estate of Sir James Kinloch of that ilk, the following question occurred:

The Lady Kinloch stood secured in a liferent out of the estate of Kinloch, by infestment, dated in December, 1742, registered in February 1743. George Dempster, merchant in Dundee, stood infest on an heritable bond, conceived in common form, for L. 20,000 Scots in the said estate, also in December 1742, and his sasine was registered January 1743, some weeks before the Lady's infestment was registered; but then he had at the date of his heritable bond advanced only L. 8735 Scots, which he of the same date acknowledged by a back-bond, whereby he became bound to pay and deliver to the said Sir James Kinloch at Whitsunday then next, or at any subsequent term of Whitsunday or Martinmas, the balance of L. 11,265, intimation being always made to him 40 days preceding the said term; and thereby it was further declared, that if the advance already made, and others thereafter to be required, should not extend to the foresaid sum of L. 20,000, in that event, the foresaid heritable bond, with what should follow thereon, should be restricted to what should be truly paid and advanced of the said L. 20,000 Scots money and no further. And by a writing on the back of the back-bond, of the 12th December 1743, Sir James acknowledged the obligation to have been implemented by payments at different times preceding that date of the said balance of L. 11,265.

The objection made for the Lady was, That George Dempster's infestment could give him no preference for the L. 11,265, as not advanced till after she was infest. By the common law before the 1696, it was lawful to grant an heritable security for debt contracted, or to be contracted, which became effectual from the date of the subsequent contraction; but still an intervening infestment to a third party was preferable to the security for the debt contracted after it: But by the act 1696, it is declared, That any disposition, or other right, granted for relief or security of debts to be contracted, shall be of no force as to debts contracted after the sasine, without prejudice to the validity thereof.

as to other points, as accords, and both on the former law and on this statute, No 104. the objection was laid for the defender.

Answered for the pursuer, That he admitted the doctrines to be just both upon the former law, and upon the statute; but that neither did apply to the present case, because the whole L. 20,000 was truly in the sense of law advanced at the date of the bond. True, no more was paid in cash then the L. 8,735, but an obligation was given for the remainder, which was the same as if the money had been actually delivered in cash.

And accordingly the LORDS, by their interlocutor 17th February, 'preferred George Dempster's claim to the claim of the Lady Kinloch.'

But upon advising a petition for the Lady, and answers for Dempster, they, upon the June 'preferred the Lady's infeftment to Dempster's, so far as it was pleaded as a security for the sums advanced by him after her infeftment.'

However, this judgment would have gone, it had been of little consequence as a precedent, as the question did not turn upon any point of law, but upon the construction of the obligation in the back-bond. For it was by all agreed, that taking it as an absolute obligation for the L. 11,265 not advanced, that could have been affected by a creditor of Sir James's, it would have been secured by the infeftment, no less than if it had been advanced at the date of the bond, nothing being more ordinary than to make up a part of a sum by a bill or bond for a balance. But on the other hand, suppose it not to have been such an obligation as was affectable by a creditor, but an obligation pendent upon the will of Sir James, whether he would require the money or not, as at pronouncing the last interlocutor the majority of the Court understood it, there was as little doubt but that the last was the just judgment.

A particular objection was made to Dempster's preference as to the teinds, which, after the above judgment for the Lady's total preference, there was no occasion to determine. *Vide infra* of date June 1750, and between the same parties, *voce* SASINE.

Kilkerran, (PERSONAL AND REAL.) No 8. p. 393.

* * * Lord Kames reports this case :

1750. June 15.

SIR JAMES KINLOCH having sold the land of Glenprosin, upon which his Lady was secured for her jointure, gave her a security upon the estate of Kinloch. The deed is in the 1730; she was infeft December 1742; and her sasine recorded in February 1743.

Sir James having disposed his estate to his eldest son in the latter's contract of marriage, reserving a faculty to contract L. 20,000 Scots, found it necessary to have a ready fund to answer his demands, which his faculty could not procure him, as few people will lend money upon the faith of a faculty. Toward this end, he and his son concurred in an heritable bond to George Dempster for the sum of L. 20,000 Scots, dated in November 1742, upon which sasine

No 104. was taken the 22d of December, and recorded the middle of January 1743, before recording the Lady Kinloch's sasine. But as no more than L. 8000 was advanced of ready money at the date of the heritable bond, Dempster gave Sir James a back-bond, acknowledging, that he had advanced no more but the said sum, and obliging himself to pay and deliver to the said Sir James and his son upon their joint order, or to Sir James upon his own order, at any term of Whitsunday or Martinmas upon a requisition of 40 days, all or any part of the foresaid ballance of L. 20,000; and it concludes with this clause: "But if the sum already advanced, and others hereafter to be required, shall not extend to the foresaid sum of L. 20,000 Scots, then, and in that event, the foresaid heritable bond, with what shall follow upon the same, shall be, and is hereby restricted to what shall be truly paid and advanced of the said L. 20,000." Dempster advanced the said balance in December 1743, by which the whole sum in the heritable bond was purified.

In a ranking of Sir James's creditors, the Lady claimed preference before Dempster, except as to L. 8000 advanced at the date of the heritable bond. It was premised for her, that if the heritable bond be taken by itself, which bears the actual loan of L. 20,000, no objection can lie against Mr Dempster's preference. But it appears from the back-bond of the same date, that part only was advanced, and that the remainder was to be advanced or not at Sir James's option. Lady Kinloch then is preferable before Dempster, except as to the money advanced at the date of the heritable bond, upon two grounds; 1mo, Infestment granted for security of money cannot, from the nature of the thing, be effectual beyond the money advanced; a sum cannot be secured unless there be an actual security, and as little can a security subsist without a debt of which it is a security; *ergo*, Dempster at the date of his infestment had a real security for L. 8000 only; and he was not entitled to draw one shilling more out of Sir James's estate; and as the Lady's infestment was recorded before any further advance, she must be preferable *secundo loco*.

For illustrating this point, a competition was supposed betwixt Dempster and the Lady, before any more money was advanced; Dempster would be ranked *primo loco* for his L. 8000, and the Lady *secundo loco*. Suppose the decree to be extracted, it will not be said that Sir James could overturn this decree by taking more money from Dempster; but is not the Lady's infestment equivalent to the supposed decree of preference; if Dempster could only take place of her for L. 8000 at the date of her infestment, no posterror deed of Sir James could deprive her of her place.

The Lady's second ground of preference is upon the following clause of the act 1696, declaring, "That any disposition, or other right granted for relief or security of debts to be contracted, shall be of no force as to debts contracted after the sasine, but prejudice to the validity of the disposition as to other points." And here the only question is, whether the whole L. 20,000 was contracted at the date of Dempster's infestment, or only L. 8000? It is true, Dempster stood bound to advance the whole if Sir James should require it.

But a promise to lend a horse for a certain use is not *commodatum*; neither is a promise to lend money, if it be demanded, a *mutuum*; there is no debt established by such a promise. What if the back-bond had run thus, that Sir James should accept of what Dempster should please to advance to the extent of L. 20,000; this would not have validated the infestment *a principio*, nor have made Sir James debtor to Dempster; and yet there is no difference; a debt cannot be contracted without the borrower's consent, more than without the lender's.

It may be added, that an obligation to lend money is of little significance to the obligee, as damages, in case of refusal, cannot be ascertained.

The Lady concluded with the following observation, that had Sir James intended to give Dempster an heritable bond, without any consideration or mutual cause, it might be good, if not challengeable upon the bankrupt acts; but the *species facti* is a security for debt, whereof part only was advanced; in such a case the security must be commensurate with the debt due. The case here is different from that where there is an obligation to relieve a man of debts contained in a list, and where the obligant gets an infestment for his security. In that case, the whole debt is contracted at once before infestment is taken; the person infest stands bound to relieve the granter of certain debts.

At advising, Elchies insisted, that George Dempster's back-bond made him debtor to Sir James Kinloch, that Sir James could assign the back-bond, and that the debts therein contained were arrestable by his creditors. Arniston and the other Judges were of opinion, that the back-bond did not constitute a debt, that no action of debt could lie upon the back-bond, but only an action to create a debt, or to lend money, and that, when Dempster advanced the money, it was not paying a debt due by him, but on the contrary, it was lending money, and creating a debt.

Accordingly it carried, Elchies only dissenting, that the Lady was preferable before Dempster, *quoad* the sums advanced after the date of her infestment, both by common law and by statute; by the common law, because a security cannot be without a subsisting debt which is secured; and by the statute, because there was no debt contracted at the date of Dempster's sasine, except the L. 8000.

Rem. Dec. v. 2. No 115. p. 233.

* * This case is also reported by D. Falconer :

1750. June 13.

SIR JAMES KINLOCH of that ilk, and Dame Elizabeth Nevay his wife, disposed their respective estates of Kinloch and Nevay, in the year 1730, to their son James Kinloch, in his contract of marriage, reserving to Sir James the life-rent of Kinloch, with a faculty of burdening the same with L. 20,000 Scots; and the estate of Nevay with 17,000 merks, reserving the annuity of 1000 merks thereon to the lady in case of her surviving her husband; and Sir James

No 104.

granted his Lady an annuity of 1000 merks out of the estate of Kinloch, in lieu of the like provision on another subject which she had renounced ; whereon she was infeft in December 1742, and the sasine registred in February 1743.

Sir James and James Kinloch granted an heritable bond to George Dempster, merchant in Dundee, for L. 20,000 Scots, as borrowed at Martinmas 1742, payable at Whitsunday 1743, with annualrent at two terms in the year ; on which he was infeft 22d December, subsequent to my Lady's infeftment ; but his sasine recorded in January prior to her's.

George Dempster, 20th November 1742, granted a back-bond, declaring, That notwithstanding the bond granted to him, acknowledging the receipt of L. 20,000 at Martinmas last, yet he had only advanced L. 8735 of it ; therefore, with and under the provisions and declarations after specified, binding and obliging him to pay to the said Sir James Kinloch, and James Kinloch Nevay, upon their joint orders or receipts, or to the said Sir James Kinloch, upon his own order alone, at Whitsunday next, or any subsequent term of Whitsunday or Martinmas thereafter, all or any part of the balance of L. 11,265, they always intimating any demand 40 days preceding the term of payment of the same ; providing that Sir James Kinloch, and James Kinloch Nevay, should be bound and obliged to admit and sustain what orders and receipts should be granted either by them jointly, or Sir James himself alone ; and after such payments should be made, as should, with the foresaid sum advanced at Martinmas last, extend to L. 20,000, then the back-bond should become void and null ; but if the advance then made, and others to be required, should not extend to L. 20,000, then the heritable bond should be, and was thereby restricted, to what should be truly paid ; and Sir James Kinloch and his son granted on the back-bond, 12th December 1742, receipt of the within sum and annualrents.

Sir James Kinloch Névay succeeded to the estate on his father's death ; and, engaging in the rebellion, was attainted ; and claims were entered by Lady Kinloch for her annuity of 1000 merks, and George Dempster for L. 20,000, with an annualrent effeiring thereto, which were both sustained on the estate of Kinloch.

Lady Kinloch craved to be preferred to George Dempster, in so far as the money for which he was secured was not advanced by him before her infeftment, as he was then creditor only for what he had truly paid, and could not afterward become creditor for more, so as to claim a preference for it to her real right.

Answered ; He was creditor at the date of his infeftment for L. 20,000, and the onerous cause he had given for it, was his obligation to pay up the money, which could have been made effectual against him.

THE LORDS, 17th February 1750, ' Preferred George Dempster's claim to the claim of the Lady Kinloch.'

Pleaded in a bill and answers, and on a hearing which was ordered on this question ;

For the Lady, George Dempster did not grant any absolute security for the balance, which might have been transferred or affected by creditors, and therefore might, with more colour, have been called a value paid, so as to have made the counter-obligation a debt to him ; but his obligation was conditional, to pay if demands were made upon him, which never might have been made ; and in that case the heritable bond was restricted. His debt only arose on the existence of the condition ; and before that, her infeftment intervened, which could not be hurt by his after contraction. There were instances in law of rights, not valid from the beginning, which might afterwards be made good ; as of a base infeftment, which might be clothed with possession ; but if a public infeftment had been obtained prior to the possession, it would not be hurt. Thus far by common law : But by act 1696, for declaring notour bankrupts, it was statute, ' That any rights that should be granted for relief or security of debts to be contracted, should be of no force as to debts contracted after the sasine ;' which was precisely the case of the debt competed on.

For George Dempster, The statute annuls securities for debts in general to be contracted ; but, in many cases, the extent of a debt contracted may be uncertain ; as in infeftments for relief and of warrandice ; and in some it is uncertain if any debt shall ever exist, as of a jointure to a wife. This case is not at all that of the act, where security is given for a precise sum, and that really due at the time. The bond granted to George Dempster is precisely such as his competitor supposes would make a good ground of a counter-obligation. It might have been transferred, and claimed against him ; nor could he have retained any part thereof, on account of his claim against Sir James Kinloch. If he had died, his executor would have been debtor, and his heir creditor in the heritable bond. And though, if he had been pursued himself by Sir James, he might have defended himself ; it could only have been by proponing compensation ; which would not have been competent to him, if the term of payment of the heritable bond should be supposed suspended to a term later than when his bond was exigible. Many transactions have been conducted in this manner: The banks have lent money on heritable bonds, and have only paid part of the sum, and given obligation for the remainder at a term. And in one case the money was immediately put into the granter's cash account ; so that the bond was to be a security for what he should draw out. And the LORDS found, That a bond being renounced upon payment, but the renunciation not registred, revived on retiring it, 19th June 1745, *Campbell contra Creditors of Auchinbreck, voce RIGHT IN SECURITY.*

THE LORDS found George Dempster preferable for the sums paid by him prior to the Lady's infeftment ; and found, that she was preferable to him as to the remainder of his claim. See *RIGHT IN SECURITY.*

For Dempster, *R. Dundas, R. Craigie, & Serymgeour.*
and *Hamilton-Gordon.* Clerk, *Forbes.*

For the Lady, *H. Home, T. Hay*

D. Falconer, v. 2. No 137. p. 156.

1781. February 13.

DAVID and HUGH MITCHELL *against* WILLIAM FERGUSON.

No 105.

A. purchased a house from B., and entered to possession. A. assigned her disposition to C., without having been infeft. C. likewise omitted to take infeftment. The house was adjudged by a creditor of B. The adjudication was found preferable to the personal disposition.

AGNES CARSON purchased a house from William Donald, of which he executed a disposition in her favour. She then entered into the possession; but, without being infeft, assigned the disposition to William Ferguson; who likewise omitted to take infeftment.

Meanwhile, David and Hugh Mitchells, creditors of Donald, led an adjudication of the subject, upon which they were infeft. And thence arose a competition between these adjudgers and Fergusson; the latter, *qua prior* disponee, with a personal right only; the former, *posterior* adjudgers, but whose diligence had been completed by infeftment.

Pleaded for Fergusson; Within the legal, an adjudger, though infeft, and in possession, is, in the judgment of law, not properly vested in the feudal right; nor is he protected against even the personal deeds of the reverser; notwithstanding that these do not appear in any public record. For, says Lord Stair, (3. 1. 21.): 'Because apprisings within the legal may be taken away in the same manner as personal rights; therefore assignations, discharges, and back-bonds, by those who have right to apprising, being made within the legal, are effectual: But, after expiring of the legal, infeftments upon apprisings are in the same case as infeftments upon irredeemable dispositions.' And, to the same purpose, Lord Bankton, (3. 2. 60.) Again, it is clear, that, within the legal, the right of an adjudger may be extinguished in such a manner as is not discoverable by means of any public register; for example, by a discharge merely, or, *ipso facto*, by intromission; so that registration is not requisite to render any deed effectual against a deed of that kind; Erskine, (2. 12. 36.)

Now, according to the adjudgers own plea, if, prior to their infeftment, *sasine* had followed on Donald's disposition, and had been duly recorded, all effect of their diligence must have been precluded. But, as it has likewise become evident, that it is no sufficient objection to a deed affecting the right of an adjudger, though infeft, if, before expiry of the legal, either that such a deed is only personal, according to Stair, or that it is latent and unregistered, agreeable to Erskine; it follows, that, in the present case, *sasine* was not necessary to make the disposition effectual against the subsequent adjudication.

To this simple deduction, it cannot reasonably be objected, that the personal deeds of an adjudger have a stronger effect against his singular successors, than those of the proprietor himself, executed at a time when his right was unlimited, could produce against the adjudger. This were to suppose adjudgers to derive from proprietors, more extensive rights than these last themselves could claim. On the contrary, it is to be remarked, that a singular successor to an adjudger, is in a more favourable situation with respect to his author, than the

the adjudger is, as to the reverser; because the former has a direct reliance on the subjects adjudged; whereas the latter, prior to his adjudication, may not have had them at all in his view.

This question may be placed in another light, flowing from more general principles. A person who grants a second disposition *in fraudem* of the first, is thereby guilty of a crime. This, then, is an act which the law will compel no man to perform. But will it, nevertheless, interpose itself in the place of the disponent, and, in effect, do the very same thing, by adjudication? That idea seems equally repugnant to common sense and to law. It is clear, that a prior disposition, with or without infeftment, is preferable to every subsequent personal one. And, though it is likewise true, that a subsequent disposition, by being clothed with infeftment, may become effectual against the prior remaining personal; yet this consequence is widely different from the case supposed: For, notwithstanding that the *dolus* of the disponent has occasioned the second conveyance, which thus becomes valid in law, still the law by no means gives force or effect to that fraud. The statute 1617 has appointed records as the medium through which information, concerning the conveyance or the burdening of lands, is to be communicated. If a *bona fide* purchaser, who, upon the faith of this legal information, bargains and pays his money, were, by a personal and latent deed of his author, to be cut out from his purchase, his situation would be more severe than that of the person who had obtained that deed; because, besides labouring equally with the latter, under the deceit of his author, he would also have been deceived even by the law itself, which had established the credit of its records; a thing too absurd to be imagined. But, as it is merely through a just confidence in these, that a second disponent is rendered secure; so a posterior adjudging creditor, who did not contract in reliance upon them, but trusted solely to the personal security of his debtor, can no more exclude an anterior disponent without infeftment, than with it appearing on record. So far as concerns the lands adjudged, the latter has no *bona fides* to plead, respecting either his debtor or the law; since, had he not relied on his debtor's personal security merely, he would have taken heritable security.—In a word, a disponent is entitled to demand the subject conveyed, according as it appears from the records. An adjudger, on the other hand, having no reliance on these, must be contented to take that which he has adjudged, *tantum et tale*, as it stood in the person of his debtor.

This doctrine is confirmed by the following additional authorities: Dirleton's Doubts, *voce* COMPRISING, and Sir James Steuart's answers, where it is laid down, that rights pass to adjudgers, *cum sua causa et labe*. The decisions from 1670, downwards, as stated by Stair, support back-bonds against adjudgers. The case of Neilson, 28th January 1755, (see APPENDIX) comes still closer to the point: Also Gibb *contra* Livingston, 14th December 1763, (see APPENDIX). In that of Bell against Garthshore, 22d June 1737, No 80. p. 2848, the distinction between adjudgers and disponents, not having been stated, was not

No 105. attended to. See likewise *Menzies contra Gillespie*, 8th December 1761, No 174. P. 5974.

Answered for the adjudgers; Such is the nature of feudal rights, that they cannot be affected, qualified, or burdened by any personal deed. Notwithstanding even a conveyance, if only personal, the feudal right still remains in the disposer.

This principle is firmly established by the judgment of the Court in the case of *Bell contra Garthshore*, mentioned by the disponent; in which, it is true, the argument, with respect to adjudgers taking only *tantum et tale*, was not touched; a sign of its not being solid. The only question then agitated was, Whether a *personal* disposition were not sufficient to denude the disponent of a feudal right remaining merely personal? But the principle of that decision, which likewise determines the present question is, that *personal deeds cannot affect feudal rights*. From this principle it arises, and not from any effect of *bona fides*, that a second disponent, the instant he is infeft, excludes the prior remaining without infeftment. For, though *mala fides* may cut down a title, no *bona fides* can, of itself, create a right. Even the statute 1617, on which the disponent chiefly founds his argument, is a strong authority for the adjudgers on this point. It has prescribed the registration of sasines and reversions; and why not also of dispositions? The reason is, that the former, in their nature real, may qualify a feudal right, which the latter, being personal, cannot. As for the argument, that the law ought not to do what the disponent himself could not lawfully do, it is quite deceitful. A bankrupt debtor cannot, indeed, lawfully disponent to any of his creditors, in prejudice of the rest; but is none of them entitled to adjudge? Again, if a man grants one disposition without procuratory and precept, and afterwards to another disponent, a second with both, he cannot, it is true, *bona fide*, execute a third conveyance in favour of the first disponent; yet surely this disponent is not precluded from leading an adjudication in implement. All the decisions quoted on the other side, as also the opinions of Dirleton and Steuart, refer to act 1621, and to those *fraudulent* rights acquired in contravention of that statute, which an adjudger must take *cum sua labe*.

Were the opposite doctrine to be received, many opportunities would be afforded for the commission of fraud. Thus, for example, our marriage-contracts are sometimes framed in the English form, bearing a conveyance, *de presenti*, to trustees, who may not perhaps infeft themselves. Creditors, ignorant of this conveyance, lend their money, lead adjudications, and justly think themselves secure. Upon the footing of this doctrine, however, the trustees, by that personal deed, would preclude them. Or, suppose a man owing debts to grant an heritable bond without infeftment, and afterwards to borrow money from other creditors, who, for their security, adjudge. By that latent bond, according to the same doctrine, they may be totally cut out.

The plea of the adjudgers is also supported by these authorities: Ranking of the Creditors of Sir John Douglas of Kelhead, 22d February 1765, (see APPENDIX)

Countess of Caithness, and Lady Dorothea Primrose, against Creditors-Adjudgers of the Earl of Roseberry, No 103. p. 10288.

No 105.

THE COURT, on a hearing in presence, ' Found, That the adjudication, and infestment following upon it, are preferable to the personal disposition founded on by Fergusson.'

Lord Ordinary, *Monboddo*.
Clerk, *Colquhoun*.

Act. *Rae, G. Fergusson*.Alt. *M^cLaurine, M^cCormick*.

Fol. Dic. v. 4. p. 72. Fac. Col. No 35. p. 60.

1786. November 15.

THOMSON against DOUGLAS, HERON, & COMPANY.

A PARTY having acquired a right to lands under trust, but fraudulently omitting the trust in his infestment, his adjudging creditors were thought liable to the objection which lay against him, their rights not being completed by infestment.

No 106.

N. B. This point, though stated in the report, No 52. p. 10229, was little discussed, as the fund was said to be exhausted by preferable debts; and the Court did not mean to lay down the rule in general, that adjudgers must take *tantum et tale*.

Fol. Dic. v. 4. p. 72.

1787. August 8.

CREDITORS of SIR JOHN SINCLAIR against Captain JAMES SUTHERLAND.

IN consequence of a stipulation contained in a lease granted by Sir John Sinclair of Mey to Captain Sutherland, the latter, after the death of the former, made several payments to Sir John's Creditors.

Several years afterwards, the other creditors deduced adjudications *contra hereditatem jacentem*, and sued the tenant for the whole rents which arose after that period, as being all attached by such adjudications.

The defender *pleaded*; If, before the death of the landlord, and after the payments made by the defender, a creditor of the former had adjudged his estate, the latter would have been entitled to plead, that by such payments, made under the authority of the landlord, the posterior rents were so far actually extinguished; and that, therefore, he could not be liable for them; although, perhaps, the same plea could not be maintained against a *bona fide*

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No 107.

Payment of rents by a tenant, after his landlord's death, in virtue of a special authority contained in his lease, found effectual against the creditors of the landlord, who afterwards attached the lands, by adjudications *contra hereditatem jacentem*.

No 107. purchaser. The effect of adjudication *contra hereditatem jacentem*, is clearly at least no stronger than that of other adjudications. If the heir of Sir John Sinclair had not renounced, the adjudication of the creditors would not have been *contra hereditatem jacentem*; in which case, they would not have competed with the defender; and it would be strange, if the renunciation of the heir should bestow the preference upon them. It is clear, they thus come into the place of the heir; and the same obligation which he would have lain under must fall upon them.

Answered; By adjudication *contra hereditatem jacentem*, not only lands themselves, 'but the bygone rents and the duties thereof, preceding the adjudication and after the defunct's death, may be adjudged;' Stair, b. 3. tit. 2. § 48. Accordingly, such adjudication was found preferable to an assignation of mails and duties, with respect to the rents falling due between the proprietor's death and the date of the adjudications. Nothing less than a real right can be effectual, either against singular successors, or against creditors by whom real diligence has been used.

THE LORDS at first found, "That the defender was not entitled to plead retention of the rents of the unentailed lands, which fell due after the death of Sir John Sinclair, and to apply said rents in payment of debts due by Sir John, to the prejudice of those creditors of Sir John who have obtained decreets of adjudication *cognitionis causa* against Sir John's heir."

But this interlocutor being brought under review,

The Court "found, That the defender is entitled to take credit for the rents falling due between the death of Sir John Sinclair and the adjudications led *contra hereditatem jacentem*, to the extent of the debts paid by him."

To this judgment the Court adhered, after advising a reclaiming petition and answers.

Lord Ordinary, *Alva*.
S.

Act. Dean of Faculty.

Alt. Honyman.

Clerk, Orme.

Fol. Dic. v. 4. p. 73. Fac. Col. No 346. p. 535.

1792. January 31.

JOHN RUSSELL, HUGH ROSS, and Others, *against* CREDITORS of HUGH ROSS of Kerse.

No 108.

An entail not followed by infestment, not effectual, though recorded, against the real diligence of the creditors of the institute, he being also heir of line.

THE father of Hugh Ross, who stood infest in the lands of Kerse, executed an entail of them, containing the usual clauses, in favour of him as institute, and of a series of substitutes.

The deed was recorded in the register of tailzies; but sasine did not follow upon it.

Mr Ross, after his father's death, expedite a general service as his heir of line; but made up no titles under the entail.

He had contracted considerable debts, as his father also had done ; and some of his creditors having charged him to enter heir of line in special to his father, led adjudication, which was completed by infeftment.

A process of sale having being raised, the estate was purchased by Mr Russell ; after which a doubt was entertained, whether or not the entail, personal as it was, precluded the above mentioned diligence. In order to try this point, on which the right of the purchaser depended, an action of reduction, at the instance of the Creditors, was raised, in which the purchaser, together with Mr Ross, and the other heirs of entail, were called as defenders. On the part of the pursuers it was

Pleaded ; No personal right, such as that resulting from the entail in question, could ever be placed in opposition to the real right of a creditor-adjudger completed by adjudication, if proper attention were given to the distinction between those different kinds of right.

The first is that by which a person is vested in the property of a subject ; the other that which gives a title or claim to become so vested, but does not transfer the property. Thus, if any one infeft in lands convey them to a party, who postpones the taking of sasine, and if, in the mean time, he again dispoise them to a different person, by whom infeftment is immediately obtained, the latter alone becomes proprietor, or is vested with the property, while nothing remains to the former but a personal action against the fraudulent dispoiser. In like manner, before a dispoinee be infeft, he may be cut out by an adjudging creditor of the dispoiser's, whose right is completed by sasine ; June 1737, Bell *contra* Garthshore, No 80. p. 2849. ; 13th February 1781, Mitchels *contra* Ferguson, No 105. p. 10296.

Now Mr Ross's father, who was infeft in the estate, granted a disposition in favour of a series of heirs of entail, on which, however, sasine did not follow. The granter, therefore, during his life, continued vested in the property of the estate ; and at his death, it was *in hæreditate jacente* of him, being then subject to a twofold claim or personal right ; first, that of the heirs of line, and next that of the heirs of entail. Both these rights belonged to Mr Ross, and under either of them he could become vested in the fee. If he did so as heir of line, by special service and infeftment, a claim of forfeiture, no doubt, against him would thence accrue to other heirs of entail ; but it is perfectly obvious, that this presupposes him, in the first instance, to have acquired the unlimited right of property. Hence, being fully vested, he could dispoise with effect ; and the right of the dispoinee would be unchallengeable, when clothed with infeftment. For the same reason, his creditors could adjudge with effect, the special charge, authorised by act of Parliament 1540, being equivalent to a special service.

For farther illustration, let it be supposed, that Mr Ross's father, instead of a deed of entail, had executed a conveyance to an onerous purchaser, which

No 108. certainly will not be supposed a less valid disposition. It is clear, that, if this purchaser remained uninfest, another purchaser, acquiring right from Mr Ross, might have effectually vested himself in the property by adjudication in implement; or any creditor-adjudger could have equally obtained a complete real right.

The registration of this entail is nothing at all to the purpose. The statute of 1685 superadded that new requisite for the safety of creditors and of purchasers; but has no tendency to render a personal right a real one, which alone could have effect against the complete real diligence in question.

Nor could creditors or purchasers derive any advantage from this registration in the record of tailzies, when that of sasines gave them no information of the existence of such a restraint on the property.

These observations received the sanction of the Court, in the case of the Creditors of Douglas of Kelhead, in 1765. (Not reported.)

Answered; Mr Ross's right is subject to forfeiture, in virtue of the irritant and resolute conditions of the entail; so that a declarator of irritancy, at the suit of the substitute heirs, would entitle them to hold the estate unburdened with debts, and should seem to lay the subjects purchased open to eviction.

For the argument founded on the want of sasine seems to be obviated by the statute of 1685. It requires, indeed, the insertion of the irritant and resolute clauses in the instruments of sasine; and if there had been infestment, this requisite would here have been essential; but as there was not, it is enough that the limitations appear on record in the procuratory of resignation.

Accordingly, in the case of Denham of Westshiels, *voce* TAILZIE, it having been found, that a personal entail was ineffectual against creditors, that decision was reversed on appeal.

THE LORD ORDINARY reported the cause on informations, when a hearing in presence was appointed; and it was ordered, that the informations in the case of Kelhead should be reprinted, for the perusal of the Court.

On advising the question, however, the Court were unanimously of opinion, that the personal entail could have no effect against the real right of the creditors, and that this was a point which admitted of no doubt. And it was observed, that what had given occasion to so ample a discussion, was an opinion expressed on the Bench in the case of Thomson against Douglas, Heron, and Company, (No 52. p. 10299.) "That adjudging creditors stand in a different predicament from disponees, as they must take the right of their debtor *tantum et tale*, as it is in his person;" an opinion now stated to have been erroneous.

Reporter, *Lord Swinton*.

For the Creditors, *Rolland et alii*.
Clerk, *Sinclair*.

Alt. *Wight et alii*.

§.

Eol. Dic. v. 4. p. 73. Fac. Col. No 200. p. 421.

*** N. B. The Court had pronounced a similar judgment in the case of Stewart and others, Creditors of Sir John Douglas of Kelhead *contra* Douglas, in 1765, which is omitted in the reports of that year. See APPENDIX.

S E C T. VIII.

Effect of Irritancies, &c. not ingrossed in the Infefment.

1664. December 1. EARL of SUTHERLAND *against* GORDON.

AN irritant clause, *ob non solutum canonem*, contained in the disposition of feu, but neither in the charter nor sasine following thereupon, is not real, nor effectual against an appriser. It is otherwise, if sasine follow directly upon the disposition, in which case the disposition serves for a charter.

Fol. Dic. v. 2. p. 70.

*** This case is No 61. p. 7229. *voce* IRRITANCY.

1706. July 7.

Sir HUGH CAMPBELL of Calder *against* The CREDITORS of HAY of Park.

IN the ranking of the Creditors of Park Hay, Sir Hugh Campbell of Calder founded upon an heritable bond of relief for several cautionaries he stood engaged in for Park, whereupon he had taken the first infefment; and craved preference, not only for the principal sums, annualrents, and expenses paid by him to the common debtor's creditors, and these annualrents and debursements stated as a principal sum bearing annualrent from the time of payment; but also sought to be preferred for the expenses of expeding his infefment, and making it effectual against the other competing creditors; because, his bond of relief doth expressly provide that his infefment shall not be redeemable till he be reimbursed, not only of all charges and damages in general, but also of the expense of his infefment; and his charter under the Great Seal repeats these obligations, and both it and his sasine expressly relate to the reversion in the way and manner as the same is contained in the bond of relief, registered and made publick.

Answered for the other Creditors, However the expense of Sir Hugh Campbell's infefment might be the foundation of an action against Park Hay, it is inconceivable upon what ground it can be real against the estate, to the exclu-

No 109.

No 110.

An heritable bond of relief provided, that the infefment to be expeded on it should not be redeemable till the cautioner should be reimbursed of all charges and damages in general. He was found preferable only for sums, annualrents, and expenses paid by him to the creditors of the common debtor, not for the expenses of his infefment, or of supporting his right in the competition.

No 110. sion of other creditors; seeing there is no such provision in the infestment, which is only granted for relief of debts particularly therein enumerated. Nor doth it alter the case, that the infestment relates to the charter; seeing singular successors are only obliged to notice what is expressly and fully contained in the sasine; and the words of the charter, To be relieved of all cost, skaith, or damage, can only relate to the debts he stood engaged for. 2do, Whatever might be pleaded as to the expense of expeding his infestment, it is absurd to pretend that the debursements in maintaining his right against the competing creditors ought to be sustained; seeing in competitions every creditor must bear his own burden of expenses for his own security.

THE LORDS sustained preference upon the infestment of relief for the principal sums, annualrents, and expenses paid by Sir Hugh Campbell to Park's Creditors, and allowed the same to be stated as a principal sum at the time of payment; but refused to sustain his claim of expenses for expeding his infestment and making it effectual against the other competing creditors.

Fol. Dic. v. 2. p. 70. Forbes, p. 124.

1711. November 27.

AGNES COLQUHOUN LADY MONTBODDO against HALIBURTON of Newmains, and JANET CAMPBELL, his Spouse.

No 111.

Found, That an irritant resolutive clause which was unusual, and not inserted verbatim in the precept and instrument of sasine, but only by general reference, could not prejudice a singular successor.

THE said Agnes being married to Irving of Montboddo in 1665, by their contract of marriage she disposes to him the lands of Kippock, &c. wherein she was infest as heir to her father, and he obliges himself to infest her in a liferent jointure out of his own lands of Montboddo; but it bears this clause, that if either of them failed in performance to one another of their several obligations, then this contract was to be void and null, in the same manner as if it had never been made, nor *in rerum natura*, and each party-contractor should enjoy and possess their own proper estates, as if the said marriage had never been solemnized. The husband was infest in the wife's lands by virtue of the precept of sasine contained in the contract; but the wife was never infest in his lands for her jointure, there being no precept for her, but only a procuratory of resignation, which was never expedited nor prosecuted. And he being in great debts, not only his own proper lands of Montboddo, but likewise those disposed to him by his wife, are evicted by his creditors, and adjudged from him; and he dying about the 1675, Janet Campbell's father, and others of his creditors, enter into possession of the lands that came by his wife, and Burnet of Alagarven purchased his own lands of Montboddo; so that Agnes, his widow, was debarred both from her own proper lands, whereof she had been heiress, and likewise from her liferent provided to her forth of her husband's lands. And

after many essays to recover her rights, she at last raises a declarator of the irritancy of the contract, and that she may enter to her own lands, whereof she was heiress, in regard her husband failed in performing his part of the contract, by infesting her in his lands for her liferent use, and had suffered both his own and her estate to be carried away by his creditors. *Alleged, 1mo*, You cannot declare the property of the lands to be yours, unless you produce your infestment therein, as heir to your father. *Answered*, If I had no right, then my husband, to whom I disponed, and who is your author, could have none; and so you cut the branch on which you stand; but the truth is, the contract bears I was infest, and my sasine has been given up when he transacted with the creditors. *2do, Alleged*, You can never declare the irritancy, seeing it was incurred through your own fault and negligence that you did not resign and compleat your right by infestment. *Answered*, I was *vestita viro subque ejus potestate*, and I could do nothing for myself. It was his duty to have secured, and he neglected it; neither were there any friends named in the contract, at whose instance execution was appointed to pass; so being wholly destitute of help, and his estate evicted in his own lifetime, I cannot be said to have been either *in culpa* or *mora*. The Lords laid small weight on these two allegances; but the third defence struck with them, as of more import and moment; which was, that she had legally denuded herself in favours of her husband, whom they found infest, and they, as his creditors had fully denuded him by adjudications 35 years ago, and been in peaceable possession ever since; and though the husband's right bear *in græmio* a relation to the contract of marriage, and to be granted to him by the wife, under the provisions, restrictions, and limitations therein mentioned; yet that being only a reference in general terms, it was noways here sufficient to put the creditors *in mala fide* to contract with him, or affect singular successors, nothing making it real unless it had been *verbatim* engrossed in the precept or body of his sasine, as is clear from the act 1617, for registration of sasines, that reversions must be incorporated in the body of the infestment; and the act of Parliament, introducing tailzies in 1685, requires, that the irritant clauses be inserted in the procuratories, charters, precepts, and instruments of sasine, otherwise not to be effectual against singular successors; and so the Lords decided on the 26th of February 1662, The Viscount of Stormont against The Creditors of Annandale, *voce TAILZIE*; and Canhan *contra* Adamson, No 56. p. 10233. and No 53. p. 2727. And if general clauses were sustained, it would be a snare to creditors, and destroy commerce. *Answered*, Creditors ought to know the condition of him with whom they contract, and can have no more right than he had, for *uti debent jure auctoris*, and no farther. Now here was a clear beacon and meith set up to warn you, viz. his sasine burdened with the provisions, conditions, and limitations contained in the contract of marriage; and you ought to have enquired what these were, and then you would have learned, that on the husband's failing to perform his part, she was in her own place, and

No 111. might return to her own lands; and till the act 1685, there was no necessity of engrossing the irritancies at length, but a general reference was sufficient to put all parties *in mala fide*. And wherefore was warrandice introduced but to secure against such clauses? Some thought there was a difference betwixt voluntary purchasers and legal adjudgers; that the first were bound to know the qualities and conditions of their author's right, which creditors could not so well come to the knowledge of. Others thought adjudgers in a worse case; for they do not follow the faith of registers when they lend their money, and they are put to adjudge their debtor's lands, which can carry no more but such right as he had; whereas a purchaser lays out his money *ab initio* to obtain a real right. THE LORDS by plurality found, seeing this irritant and resolute clause was unusual, and not inserted *verbatim* in the precept and instrument of sasine, but only by a general reference, it could not prejudge the singular successors, and therefore assoilzied from her declarator of the irritancy.

Fol. Dic. v. 2. p. 71. Fountainball, v. 2. p. 678.

No 112. 1729. February 6. GALL against MITCHELL.

A FEU was granted in the year 1611, with this express irritancy, That if the feuer annalzed the land, without previously offering the same to the pursuer for re-payment of the sum advanced for the feu-right, the feu-contract should be null and extinct, and all that might follow thereupon. This irritancy was brought into the charter as it was in the feu-contract, but omitted in the precept of sasine, whereby it came about, that it was not engrossed in the sasine, nor in any of the following infestments, not even by way of reference; whereupon it was found, That it could not affect the singular successor of the original vassal. See APPENDIX.

Fol. Dic. v. 2. p. 71.

1730. February 13.

No 113. Competition betwixt the DUKE of ARGYLE and the CREDITORS of BARBRECK.

A SUPERIOR granted a feu-right to his vassal, with certain prohibitory and irritant clauses. These clauses were engrossed at full length in the charter, but not in the precept of sasine, nor in the sasine itself, otherwise than by a general reference, viz. With and under the provisions and conditions particularly mentioned in the charter. It was *pleaded*, in a competition betwixt the superior and the creditors of the vassal, That this general reference was sufficient to interpel creditors or purchasers; for no prudent persons, who lends money upon the faith of an estate in the person of his debtor, will trust to the sasine alone;

he will, no doubt, also insist for a sight of the charter. It was found, notwithstanding, That this general reference was not sufficient against creditors or singular successors.

No 113.

Fol. Dic. v. 2. p. 70.

1737. July 26. CREDITORS of SMITH *against* His BROTHERS and SISTERS.

No 114.

A FATHER having disposed his estate to his eldest son, with the burden of certain sums to his younger children, which did not enter the precept of sasine nor the sasine itself upon the precept, otherwise than by a general reference; the same notwithstanding was found effectual against the son's real creditors, seeing the burden was fully engrossed in the disposition, which was the warrant of the sasine; for, though a general reference in an infeftment is not good against a singular successor, yet a charter is a part of the infeftment as much as a sasine; and a disposition, when it is the immediate warrant of the sasine, stands in place of a charter, and is considered as part of the infeftment. See No. 68. p. 10246. See APPENDIX.

Fol. Dic. v. 2. p. 71.

S E C T. IX.

Rental Rights.—Tacks.

1752. February 29.

KER *against* WAUGH.

No 115.

KER of Moristoun being proprietor of the lands of Lighterwood, to which he derived right by progress from the Lord Borthwick, pursued a removing against James Waugh, from a farm of the said lands possessed by him upon a tack from the late Moristoun in 1721.

A perpetual rental is not good against a purchaser, more than a perpetual tack.

The defence was, That the defender's predecessor in 1592, obtained from the Lord Borthwick a rental-right of the husband-land, from which the defender his heir was now sought to be removed, and whereby he was declared to be kindly tenant for ever. That when in 1721 the defender came to take a tack of some lands adjacent thereto, the husband-land contained in the rental-right was *per incuriam* thrown in, but by which he could not be understood to have renounced the rental-right; and though there was some difference of the rent

No 115. in the tack, from what it had been in the rental, that was only occasioned by converting the grain payable by the rental into money.

When this case came before the Lords by a petition for the defender, against an interlocutor of the Ordinary upon specialities, the Lords took it up singly upon the general point, How far the rental-right was good against a singular successor? And they were of opinion, that it was not. Rentals differ in this from tacks, that tacks are null, if they have not an ish, whereas rentals may be granted to endure for ever, but are nevertheless only effectual against the granter and his heirs; and on account of that difference, it is, that the statute 17th Parl. 1449, declaring tacks to be effectual against singular successors, does not extend to rentals, which would have been a great incumbrance on the transmission of property. *Vide* Sir George M'Kenzie on the statute.

THE LORDS "Decerned in the removing."

How far even tacks would be effectual against singular successors, when granted for an unusual number of years has been questioned; and this very Session there was an occasion given, at least for understanding the mind of the Court upon it, which was this: The estate of Jordanhill was purchased at a judicial sale by Alexander Houstoun, merchant in Glasgow, who, having discovered after the sale, that a small bit of ground, consisting of little more than an acre, was not the property of Jordanhill, that his right to it was no other than a tack from the first Viscount of Garnock for 400 years; he set forth the case in a petition to the Lords, and that he was willing to retain the subject, if it should be found an effectual tack, upon his being allowed a proper deduction for the difference between a tack and a right of property, or if not, to give it up upon being allowed a defalcation of the value from the price; and craved that the Lords might afford him such remedy as to them should seem meet.

The case was stated by Lord Kames, probationer, as part of his trial, who gave it as his opinion, that a tack of such endurance was not effectual against singular successors, but that it was good against the heirs of the granter. And though there was no occasion to give judgement upon that point, of its not being effectual against singular successors, the Lords appeared to approve of that opinion, but only found, agreeable to the reporter's opinion, that it was effectual against Garnock the heir of the granter; and remitted to an Ordinary to hear parties on what deduction might be insisted for, as it was not a right of property.

Fol. Dic. v. 4. p. 71. Kilkerran, (PERSONAL and REAL.) No 9. p. 394.

* * * Lord Kames reports this case:

In the 1592, Lord Borthwick granted a rental-right of a husband-land in Ligertwood, in favours of James Waugh and his spouse, and the heirs of the marriage; which failing, to the husband's heirs whatsoever; and his Lordship binds himself and his heirs, to warrant them and their foresaids for ever, as

kindly tenants of the said husband-land, they paying of rent, six bolls bear, two bolls family-meal, &c. with 40 merks at the entry of every heir.

No 115.

In a removing of the heir of the said James Waugh by Ker of Moristoun, purchaser of the lands of Ligertwood, which was brought before the Court of Session by advocacy; the LORDS found that a perpetual rental is not good against a purchaser, more than a perpetual tack.

Sel. Dec. No 8. p. 11.

1780. February 29.

GORDON against MILNE.

No 116.

ISABEL GORDON possessing the estate of Edintore, as heiress apparent to her brother, disposed the lands to Dr Gordon, reserving her own liferent. Dr Gordon used inhibition to prevent her doing any deed to affect the lands to his prejudice. Posterior to this diligence, she let a nineteen years lease, and died before its expiration. In a reduction of this lease, urged for the tacksman, That when it was granted, the disposition in the pursuer's favour was merely a latent deed, he not having been infeft till long after. Mrs Gordon, on the contrary, being an apparent heir three years in possession, the defender's possession, acquired from her *bona fide*, must be valid: The inhibition, though it might affect all rights that touched the property of the lands, could not affect those that touched merely the possession. THE LORDS, without seeming to lay any weight on the effect of the inhibition, were of opinion, that the defender, who had derived his right from a person not infeft, was not entitled to compete with a singular successor who was infeft; and they decerned in the reduction.

Fol. Dic. v. 4. p. 70.

* * * This case is No 65. p. 7008. *voce* INHIBITION.

1794. December 10.

JAMES WADDELL against JOHN BROWN.

No 117.

DAVID MACQUATER, in 1791, by a missive, granted to John Brown, a lease of a dwelling-house and workshop in Glasgow for 17 years. Brown immediately entered into possession.

In 1792, Macquater sold these subjects to James Waddell, who, in 1793, brought an action of removing against Brown, in which he stated, that he had not been informed of the existence of the lease at the time of the purchase, and in point of law.

Pleaded: A lease is at common law a mere personal right; Bankton, b. 2. tit 9. § 1. The statute 1449. c. 17. has indeed made leases of "lands" effectual against singular successor, but neither the letter nor the spirit of that sta-

The lease of an urban tenement was found equally effectual against singular successors; as a lease of lands.

No 117. tute apply to leases of urban tenements. It is declared to have been made for the "saftie and favour of the puir people that labours the ground." Indeed, at its date, there were no leases of houses within burgh, and therefore it could not be intended to remedy an inconvenience which did not exist.

Besides, a farm or other rural subject, when let in lease, yields an annual profit; from it the lessee in general derives the maintenance of himself and family, and upon the faith of the lease, he lays out his stock in making improvements. Such lease is therefore much more an object of favour than that of an urban tenement, from which the possessor derives no income, and on which he is not even entitled to make meliorations without the consent of the proprietor; Erskine, b. 2. tit. 6. § 27.; 5th February 1680, Rae against Finlayson, *voce* TACK.

Answered: The act 1449, was meant to protect lessees of all heritable subjects, Stair, b. 2. tit. 9. § 2.; accordingly, although poor labourers of the ground only are mentioned, it was early extended to lessees of mills and fishings; besides, the word "lands," in our law language, comprehends burgage as well as rural tenements; 27th January 1768, Maclauchlan against Maclauchlan, *voce* TAILZIE.

The exclusion of urban tenements, too, from the benefit of the statute, in the present state of society, would be highly inexpedient and unjust, when leases, not of dwelling-houses only, but of valuable buildings within burgh for the purpose of manufactures, are frequently granted, and on the faith of the latter large capitals expended; particularly, as the universal understanding of the country has long been, that they are good against singular successors.

The decision, 5th February 1680, Rae against Ferguson, is erroneously stated in Lord Kames's Dictionary, the point now in question not having occurred in that case; and as Mr Erskine refers to this decision, as abridged in the Dictionary, as the sole ground of his opinion, it is entitled to no consideration.

The Lord Ordinary found, "That the missive of set by David Macquater the former proprietor, in favour of John Brown the tenant, being clothed with possession, is effectual against James Brown the purchaser."

On advising a reclaiming petition and answers, the Court considered the case as perfectly clear, and unanimously "adhered."

Lord Ordinary, <i>Polkemmet.</i>	Act. Jo. Clerk.	Alt. Cennel.	Clerk, <i>Mennies.</i>
R. D.			<i>Fac. Col. No 142. p. 326.</i>

1781. July 4. ALEXANDER M'KENZIE against GULLEN, and Others..

No 118.
Rentallers
whose rights
are derived

At the judicial sale of the Winton estate, belonging to the York-Building Company, two lots were purchased by Mr M'Kenzie; who, having expedied as,

charter, and taken infeftment, pursued an action of removing against the whole tenants and possessors of the subject.

Among the defenders in this process, were the inhabitants of the village of Seaton; many of whom, together with their predecessors and authors, had for ages possessed, for a trifling duty, the small tenements from which they were now to be removed. These subjects had been long considered by them as their property; they had descended from father to son; they had been transmitted to disponees; heritable securities had been taken upon them; and they had been carried by legal diligence. The present possessors, however, had no feudal title to produce; and, therefore, found it necessary to defend their possession upon the following grounds.

Pleaded for the defenders; *1mo*, The subjects in question did not fall under the forfeiture of the Earl of Winton; they never belonged to the York-Buildings Company; they made no part of Mr M'Kenzie's purchase; and, therefore, he has no title to pursue a removing from them.

2do, Not only are the defenders entitled to maintain their possession, against one whose title to remove them appears defective; but they are themselves proprietors of the subjects, having such a right as renders them irremovable.

That the defenders do not produce written titles, in the strict form now practised, is not inconsistent with their being proprietors. It is no more than always happens, where the right is older than the record. The ancient titles may be kept up by possession alone, without submitting to the modern forms of constitution by charter and sasine, which, as far down as the reign of James IV. were termed new inventions. Such was the opinion of the Court, and such was the judgment of the House of Lords, in the case between Lord Stormont and the irremovable tenants, or perpetual rentallers of Lochmaben, *voce TACK*. And, under the authority of that decision, it is now incontrovertible in point of law, that a right of property in lands, wherever situated, may be effectually established without the intervention of written titles, or a feudal infeftment.

Indeed, by the more ancient practice, no proprietor held his lands by more than simple possession; and long after the feudal law had been introduced into Scotland, the only method of determining questions of property, was by the verdict of a jury, proceeding upon a proof of the possession.

On this simple footing, many of the land-rights in Scotland long did, and some of them still do remain; such as, *1st*, the rights of the tenants and rentallers of the bishoprick of Glasgow, and monastery of Paisley, mentioned by Craig, lib. 1. dieg. 11. § 24.; *2dly*, Most of the rights to bishops teinds, which rest merely upon possession, and on their appearing in the rent-rolls of the crown kept in exchequer; *3dly*, All, or most of the rights to church-lands before the reformation; whence the possession of churchmen for a much shorter period.

No 118:

from a subject, cannot grant a warrant for infeftment

No 118.

than the years of prescription, has, *quoad* such lands, been admitted as evidence of the property. *4thly*, The rights of ministers to their glebes. And, *5thly*, Such rights as that of the rentallers of Lochmaben, above-mentioned. Similar rights are known in most countries, where the feudal law has been established; and such, in particular, are the copy-holds of England, which are founded solely on immemorial possession.

It is not, therefore, to be inferred from their wanting written titles, that the defenders are not real feudal proprietors of the subjects in question. That the reverse of this is the case, may be fairly presumed *in re tam antiqua*, from their long possession, and from the report made by the commissioners of inquiry, after an accurate investigation of the rights of parties. It is further proved by the old rental-book of the estate of Winton, authenticated by the Earl's subscription, wherein, under the title of feu and rental mails, are specified about thirty different persons, paying in all L. 45 Scots of money duties; and in the abstract, this L. 45 Scots is stated in one article as feu-mails; which shows clearly that they were feuers or proprietors. And, accordingly, two of the defenders in the present action have been assoilzied, as proving themselves really heritable proprietors.

In this old rental too, several of the subjects are described as possessed by heirs and relicts; which perfectly corresponds with the idea of a feudal right. And that the possessors were universally held and admitted to be heritable proprietors, appears from the various dispositions, securities, and diligences produced by them. It is also remarkable, that the family of Winton and the York-Buildings Company gave no repairs to the houses possessed by the defenders; that their small duties have not been raised for time immemorial; and that no attempt was ever made to remove them, till the present action; circumstances, which argue strongly in favour of the argument now maintained by them.

It is therefore of no consequence by what appellation the defenders are described in the old rental-books; or even that they have been in use to call themselves rentallers. The possessors of the four towns of Lochmaben were nowhere termed proprietors, but went under the denomination of poor tenants of his Highness's property, occupiers of his Majesty's lands, kindly tenants, and other names the most opposite to any idea of property; their duties were called rents, and their possessions rooms. Yet the court looked to the nature of their right, and found them to be irremovable proprietors.

But supposing the defenders to be rentallers only, still their title will prove sufficient to defend them against the present action. Rentals are distinguished by law into feu rentals and common rentals. Formerly, both kinds were considered as heritable rights, transmissible to heirs and other successors. And, although the act 1587, c. 69. declared rentals granted by the crown to be no better than personal liferents, it expressly excepted feu-rentals set to men and

their heirs, and left common rentals granted by a subject upon their original footing. Whether, therefore, the rights of the defenders are accounted of the one kind or of the other, they do not fall under the enactment of that statute, but must be heritable in the persons of the present possessors.

Nor is the doctrine, that rentals are not good against singular successors, agreeable to the principles of modern practice. Rentals are a species of tacks; and the act 1449 declaring tacks to be real rights, makes no exception. Accordingly, rentals have been sustained as giving a perpetual right; Carruthers *contra* Irvine, 23d January 1717, *voce* TACK; and tacks for a term of endurance almost equal to perpetuity, are also sustained against singular successors; 6th December 1758, his Majesty's Advocate *contra* Fraser, *voce* TACK; 27th January, 1760, Irvine of Luss *contra* Knox of Kirconnel, *voce* TACK. In the one case, the tack was for 1140 years; in the other, for 1260. The tacks on the estate of Ormiston too, which, in consequence of the indeterminable obligation upon the landlord to renew them at every return of a certain period of years, do not substantially differ from a rental, have been sustained as good against a purchaser; Wight *contra* Earl of Hopeton, *voce* TACK. And, as the act 1449, upon which all these decisions are founded, entitles every tenant, without distinction, to sit unto the issue of their terms, no good reason can be assigned for denying to rentals the benefit of that enactment.

Answered for the pursuer: In order to support the defenders in their objection to the pursuer's title, it must be taken for granted, that they are the feudal proprietors of the subjects in question. For, if they are not so, and if the Earl of Winton had a right to remove them from their possessions, there cannot be a doubt that his right is now regularly vested in the pursuer, by virtue of his charter and sasine.

The charter conveys to him the village of Seaton, and every subject and right which formerly belonged to the York-Buildings Company, lying within the boundaries of his purchase. The subjects in question are locally situated in the village of Seaton; and, therefore, it follows as a necessary consequence, that the right of removing the defenders, competent to the Earl of Winton and to the York-Buildings Company, was conveyed to the pursuer, as much as that of levying the duties which they are bound to pay for their several possessions.

2dly, Although a doubtful or a defective right may be secured from challenge by prescription, yet, a definite and temporary right can by no lapse of time become permanent and indefeasible; nor can a proper feudal title be created by possession alone, without the intervention of a charter and sasine.

The case of rentallers in general affords no aid to the defenders argument on this point; because, in fact, such rights were never reckoned to be of a permanent nature. It is true, that, anciently, the King's rentallers were held to

No 118. be heritable proprietors; Balfour, *voce* Assedation, c. 28.; and they continued on that footing till the act 1587, c. 69, gave his Majesty a power, with advice of the comptroller, to let the lands at an advanced rent, upon the death of any of the rentallers. But there was something very special in their situation; Bankt. B. 2. T. 9. § 43. Placed, as they always were, around a royal castle, they might be considered as a sort of permanent garrison; and their rights being perpetual, could be attended with little inconvenience, as a failure of duty in them, like that of any other subject, inferred treason, and was punishable by an immediate forfeiture. Whereas a subject, who had not the same power of inflicting punishment on his rentallers, however undutiful they might prove, would naturally be led to guard against such inconveniencies, and certainly would never have granted a rental, had it been reckoned a right of perpetual endurance.

Accordingly, there is no reason to believe, that, at any period, rentals granted by a subject were accounted permanent rights. The act 1587 was necessary to correct a mistake which custom had introduced, with respect to the King's rentallers. His Majesty, however, did not always exercise the privilege conferred upon him by that statute; and, in some cases, the lands, with the antient rentallers, came into the possession of a subject, who had no power to remove them. Upon this specialty stands the decision in the case of Lochmaben; and, therefore, it can afford no support to the general plea, that feudal rights may be created without writing.

Nor is the argument drawn from the different kinds of church-lands more conclusive. The destruction of the title-deeds belonging to the church, at the time of the Reformation, was so general, as to give occasion for a particular statute in favour of those who derived their rights from that source.

But, that the possessors of the subjects in question were originally no better than rentallers, is abundantly evident. The family of Winton understood perfectly well the difference between a feu and a rental; as is evident from the rights produced by the two defenders that have been assolzied, which are proper feu-charters granted by George Earl of Winton, in the 1662. The same difference was marked by the commissioners of inquiry, in framing their report; and the very nature of the thing speaks it, that a chieftain establishing a set of rentallers at his castle-gate, by way of body guard, would chuse them for some qualification; but would never think of fettering himself, by rights of an heritable or perpetual nature. Accordingly, that some of these rights were originally but rentals, cannot be disputed; and so is to be presumed of all the defenders, who have no better title to produce. Every thing leads to that conclusion; and the contrary can never be inferred from the negative circumstances alleged by the defenders.

Indeed, this is a more favourable construction of these rights, than they are in every respect entitled to. For, that writing is necessary to the constitution,

as well as to the probation of rental-rights, is laid down by Lord Stair, B. 2. T. 9. § 18.; Lord Bankton, B. 2. T. 9. § 41.; and Mr Erskine, B. 2. T. 6. § 37. Yet, not one of the defenders has produced any thing that has the smallest resemblance to a rental ticket; nor can they even connect themselves with the persons mentioned in what is supposed to be the list of the original rentallers.

But, holding the rights in question to be really good rentals, it is a proposition, established by the concurring opinions of all our most respectable authors, that a rental-right, granted even to heirs, goes no further than to the first heir; Craig, lib. 1. dieg. 9. § 10.; Spottiswood, tit. Removing and Rentals, p. 290.; Lord Stair, B. 2. tit. 9. § 17. And his Lordship mentions a case, Lord Seaton *contra* his Tenants, (See TACK,) which shows that the family of Winton did not understand a rental to be more than a temporary right, pendent on the behaviour of the rentaller, and renewable, or not, at the master's pleasure; Ib. § 19.; Sir George Mackenzie, B. 2. T. 6. § 9.; Bankton, B. 2. T. 9. § 41.; Erskine, B. 2. T. 6. § 37, and 38.; Ker against Waugh, No 115. p. 10307.

In opposition to these authorities, the decision in the case of Lochmaben, proceeding upon a speciality very different from any thing that occurs here, can have no weight. Both the general principle, and the particular usage of this barony, concur in reprobating the idea of a rental's conveying a permanent right. The defenders' original authors, though considered in the most favourable light, had no more than beneficial leases for two lives; and they have produced nothing to show that their right now stands upon a better footing.

Nor does the pursuer's situation, as a singular successor, render his right of removing more doubtful. His title is rather the better on that account. For obligations respecting lands, which would be ineffectual against a purchaser, are frequently sustained against the granter and his heirs. But, as the rights of the defenders terminated many years ago, with the lives of the first heirs, the pursuer's title to insist in the present action stands altogether unquestionable.

Few of the Judges expressed any doubt, and the Court adhered to the interlocutor of the Lord Ordinary; 'Sustaining the pursuer's title, and decerning in the removing.

Lord Ordinary, *Braxfield*.

Alt. *G. Wallace & Crosbie*.

Act. *G. B. Hepburn & Elphinston*.

Clerk, *Robertson*.

L.

Fol. Dic. v. 4. p. 71. Fac. Col. No 70. p. 116.

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1795. *February 4.*IRVING and JOPP, and their Attorneys, *against* JOHN COLLINS.

No 119.

The right of the Crown-rentallers of Lochmaben may be transmitted by infestment.

THE rentallers of Lochmaben obtained their rights from the Crown at a remote period. Their lands now form part of the barony of Lochmaben, the property of the Earl of Mansfield. In an action of declarator brought by them against one of his Lordship's ancestors, it was found, (28th December 1726), 'That they have such a right of property in these lands, that they cannot be removed, and that they may dispone their right to extraneous persons,' *voce* JACK.

James Ker, senior, one of these rentallers, granted an heritable bond to John Collins, over part of the lands contained in his rental-right. Infestment followed on the precept of sasine in the bond, and the sasine was duly recorded.

James Ker, senior, afterwards conveyed his rental-right to James Ker his son, who again sold it to John Forsyth.

Messrs Irving and Jopp, creditors of James Ker, junior, having arrested the price of the subject in Forsyth's hands; he brought a multiplepoinding, in which he called both Collins and Irving and Jopp, who also brought a reduction of Collins's bond and sasine. These actions having been conjoined, Irving and Jopp

Pleaded; The proper and customary mode of creating a burden upon rentals, is by a wadset-bond, which, when followed by the attestation of a notary, certifying that the creditor was put in real possession of the lands, completes the security. The infestment taken by Collins is inept, because the granter of the heritable bond not being infest himself, he could not give a warrant for infesting another person. It is besides clear, that rentallers, whose rights are derived from a subject, cannot grant an infestment, because they may be removed at pleasure; 4th July 1781, Maekenzie against Gullen and others, No 118. p. 10310.; and although the rights in question have been, by the decision in 1726, declared permanent and transmissible, they are in other respects of the same nature.

Answered; The granter of the heritable bond had the substantial right to the lands vested in his person, and as the law has laid down no precise form for the transmission of his right, there is nothing improper in his adopting the usual mode of conveying landed property; see Sinclair against Couper, *voce* VIRTUAL. Proprietors frequently grant feudal conveyances of subjects, particularly of patronages, which they themselves hold allodially.

The Lord Ordinary 'repelled the reasons of reduction, assoilzied the defender, and, in the multiplepoinding, preferred the said John Collins.'

On advising a reclaiming petition, and answers; it was

Observed on the Bench; Although the subject in question be burdened and transmitted without infestment, yet it is capable of being feudalized.

The mode which has been followed in the present instance, is even preferable to the ordinary method of a wadset-bond and notorial instrument, in so far as it obliges the grantee to put his sasine on record, which renders the transaction public.

The Court unanimously 'adhered.' See TACK.

Lord Ordinary, *Ankerville*.
Clerk, *Pringle*.

For Irving and Jopp, *R. Hamilton*.

Alt. *Williamson*.

R. D.

Fol. Dic. v. 4. p. 71. Fac. Col. No 153. p. 350.

Clauses in Tacks, real or personal. See TACK.

Assignment to mails and duties, no real right. See COMPETITION.

Pension when real, when personal? See PENSION.

Faculty to burden, when made real? See FACULTY TO BURDEN.

Fraud good against the purchaser's creditors. See FRAUD.

Disposition with the burden of debts, with regard to questions betwixt the grantor's creditors and acceptors. See PASSIVE TITLE.

Payment or intromission, if good against a singular successor in an infeftment of annualrent? See ANNUALRENT, INFESTMENT OF.

See APPENDIX.

APPENDIX.

PART I.

PERSONAL AND REAL.

1757. *March 9.* MACLEOD of Geanies against HUGH FRASER of Lovat.

DONALD NEILSON, then of Assint, did, *anno* 1613, grant a feu of the lands of Oldisny to John Maceanreoch and his heirs, for a yearly feu-duty of 13 s. 4 d. Scots; *proviso*, That John Maceanreoch should grant a letter of reversion, bearing the lands to be redeemable after 19 years, by payment or consignment of 1000 merks. John was infeft and put in possession; but, in the 1676, was violently turned out of possession by John Mackenzie, who having by this time acquired several adjudications upon the estate of Assint, was, by virtue of these titles, in possession of the estate. In the year 1730, Margaret Maceanreoch, heir to the wadsetter, was repossessed by authority of the Court of Session; and, about the same time, obtained a decret against Kenneth Mackenzie, son to the said John, for 16,300 merks, as the supposed amount of the rents and profits of the wadset-lands, during the years the wadsetter was illegally kept out of possession.

In the ranking of the creditors of the said Kenneth Mackenzie, Macleod of Geanies, in right of the said Margaret Maceanreoch, insisted that the wadset could not be redeemed as originally upon the payment of the 1000 merks; but that the wadsetter is entitled to hold possession till the 16,300 merks be also paid. Answered for the creditors; Supposing this defence to be good against Mackenzie of Assint, it is certainly not good against creditors who have adjudged the estate from him; "which accordingly was found."

The present case coincides with an eik to a reversion of a wadset. Such eik is good by paction against the original reverser or his heirs. The same

NO. 1.

Eik to a

reversion.

NO. 1. holds even without paction. A reverser, when he redeems a wadset, is bound in equity, over and above the wadset-sum, to pay every farthing he is due the wadsetter upon any separate account; and the equitable defence of retention, calculated to lessen the number of processes, will preserve the wadsetter in possession till this piece of justice be done him. According to this rule, the defence insisted on for the wadsetter is undoubtedly good against Mackenzie of Assint. But will it be good against Assint's creditors, or against an onerous purchaser? Even an eik to a reversion protects only against the reverser, whose debt it is, and not against a purchaser, *multo minus* an ordinary debt. Retention is an equitable remedy, introduced to save multiplicity of processes; and there is neither equity nor expediency to sustain it against a purchaser.

Sel. Dec. No. 128. p. 184.

1805. *March 6.*

Sir ROBERT PRESTON *against* the Earl of DUNDONALD's Creditors.

NO. 2.

A feus out a piece of ground to B, who again disposes it to C, stipulating by a separate deed, a right of pre-emption in favour of A. C's right remaining personal, A's right of pre-emption is found to qualify C's right, and available against creditors at a judicial sale of his estate.

IN 1745, Sir George Preston of Valleyfield feued out a small piece of ground called Kirkbrae, to General James Cochrane, absolutely and irredeemably. The right was completed by infeftment, (27th November 1748). General Cochrane sold the property to his brother Charles, who, of the same date (30th June 1750) with the disposition in his favour, executed a back-bond in favour of the General, by which he bound himself and his heirs, that before disposing of this subject, it should be offered to Sir George or his heirs at the sum of L. 307 : 13 : 4 Sterling.

Charles Cochrane was never infeft in this property; but he had previously (25th June 1749) executed a disposition of the estate of Culross, and in general of *acquirenda* as well as *aequisita*, in favour of the Earl of Dundonald.

The Earl made up titles to the estate of Culross, by obtaining from the Crown, of whom it held, a charter of adjudication, in implement of the disposition 1749, and taking infeftment on it; but the Earl's right to Kirkbrae remained personal.

In 1780, the Earl's affairs having become embarrassed, Sir Charles Preston, the son and heir of Sir George, brought an action before the Court, for having the above-mentioned clause in favour of his family made effectual: In this action the Court (20th December 1781) found, "That the tenor of the back-bond and obligation libelled on, ought to be inserted in all the subsequent titles and investitures of the piece of ground in question." (See No. 22. p. 6569). Decree of non-entry was also obtained by Sir Charles against the Earl.

An action of sale having been brought, an order was obtained from the NO. 2 Court for exposing to sale the estate of Culross, including Kirkbrae.

Sir Charles petitioned the Court, in virtue of his claim to the reversion of Kirkbrae, provided by the back-bond, and secured by the decree 1781, stating, that the lands consequently could not be exposed to sale, and praying that they might be struck out of the order for sale.

The Court (9th February 1797) found, "That the petitioner has right to redeem the lands of Kirkbrae, on payment of the sums mentioned in the prayer of the petition."

Lord Dundonald reclaimed; but his petition was (8th July 1797) refused, without answers. Upon advising a second reclaiming petition, memorials were ordered.

Upon advising these, the Court (21st November 1798) found, "That the right of pre-emption claimed by Sir Charles Preston, in virtue of the back-bond, is not a real burden upon the lands of Kirkbrae, and consequently cannot be effectual against creditors; and therefore, that these lands must be sold for payment of the debts due by the common debtor, in terms of the act of roup."

A reclaiming petition for Sir Charles was (7th December 1798) refused, without answers.

The judicial sale having proceeded, the lands of Kirkbrae were sold along with the others.

Sir Robert Preston having succeeded his brother Sir Charles, presented a petition of appeal against the judgment of the Court. The cause was by the House of Lords, (13th April 1802), "remitted back to the Court of Session in Scotland, to review the interlocutors complained of; and particularly, to find whether the back-bond given by Charles Cochrane, (30th June 1750), as mentioned in the pleadings, is not a real burden on the lands of Kirkbrae, it having been found by the interlocutor of 20th December 1801, that the tenor of the back-bond and obligation libelled on, ought to be inserted in all the subsequent titles and investitures of the piece of ground in question, which, by the decree of the Court of Session, in a process of non-entry, remains in the superior's hands, together with the mails and duties thereof, and will so continue, ay and until the lawful entry of the righteous heir; and also to find, whether the terms of said back-bond, supposing it a real burden, are not sufficient to entitle the appellant to a pre-emption."

When the cause came back to the Court, memorials were ordered, and a hearing in presence took place, when it was (9th July 1803) found, "That the back-bond given by Charles Cochrane, 30th June 1750, is a real burden on the lands of Kirkbrae, and therefore find, That Sir Robert Preston

NO. 2. "has right to redeem those lands, upon payment of the sums mentioned in the petition."

The common agent for the creditors and the purchaser reclaimed, and

Pleaded: By the judgment 1781, the Court seem to have guarded against giving any deliverance upon what effect this back-bond would have upon the rights of parties, if inserted in the investiture. The object was merely to ascertain the obligation, such as it was, and to ordain that this should appear in the future titles, whatever might be its legal effects. Now, even although it had been inserted in the investitures, it would not have been effectual against creditors; for it was an obligation, not originally executed in favour of the granter of the feu, but was taken by the vassal from his disponent, and, in all its terms, conceived merely as a personal obligation *ad factum præstandum* upon the part of the granter. There is no clause which could entitle the family of Valleyfield to secure it upon the lands; nor is it guarded by any nullity in case of contravention, nor declared to be a burden or condition of the grant.

The back-bond is not such a right of reversion as the law acknowledges, and, by registration, makes effectual against singular successors; for it was never to be in the power of the supposed reverser, to use his right of reversion, so long as the wadsetter had no compulsitor, by requisition and diligence, to oblige the reverser to pay the money advanced and take back the lands.

The back-bond, therefore, is not a reversion, but imposes a limitation upon the vassal's power of alienation. It creates a kind of entail, burdening the right of the heir in possession, in favour of the superior and his heirs. Every such right must be strictly interpreted, and can only be enforced against third parties by irritant and resolute clauses; Ersk. B. 2. Tit. 5. § 28.; B. 2. Tit. 3. § 13.; Stirling against Johnston, 4th January 1757, No. 70. p. 2342.

But, although the right to the lands was only personal in Lord Dundonald, it does not follow that his right, and all who derive through him, must be affected by this back-bond, which is admitted to be merely personal, because it has not been inserted in the investitures. If, however, when it had so been inserted, it would not have been good against the real right; while it remains personal, it cannot, for the same reason, be good against a personal right in the lands. Besides, in all personal rights, there seems to be a distinction between the grant of a right and the obligation to grant it. The one is effectual against singular successors, the other is not. The obligation in question is plainly of the latter description, importing a personal obligation upon the grantee and his heirs, in case of a sale, to offer the subject to the superior, but this has been attempted without burdening the lands,

or qualifying the right in such a manner as to be effectual in a question NO. 2. with any other parties than the grantor and his heirs.

Answered : It never was doubted, that one person may acquire a right in behalf of another ; and the party in whose favour it is stipulated, is as completely entitled to the benefit of it, as if it had been acquired by his own stipulation.

When such an obligation is inserted in the investitures, as by the decree in 1781 it ought to have been, it necessarily becomes a real burden or quality of the right, and thus effectual against the whole world. The Court did not declare it to be a real burden, because, strictly speaking, it could not be so, while it was not inserted in the investitures ; but it was declared, that the right to the lands could not be made real, without the right of pre-emption being made real also. A condition for payment of debts which, in its own nature, has no connection with the lands disposed under this burden, may be made real ; still more must conditions become real when inserted in the investitures, which directly relate to the lands themselves, and are necessarily connected with them, such as that of pre-emption, which can only be implemented by means of the lands. A clause *de non alienando*, formerly was real and effectual against singular successors, when inserted in the investiture : It required no irritant or resolute clause to give effect, but operated directly as a real quality or burden of the right. A conditional right of reversion, to take effect when the disponee chooses, or finds it necessary to sell, which is the description of a right of pre-emption, is just as valid and legal, and as effectual on the existence of the condition, as a right of reversion which is unconditional, which, when incorporated in the right, it never was doubted, qualifies it without irritant and resolute clauses. Entails which depend altogether on the will of the proprietor, without any contract with any other person, necessarily must contain irritant and resolute clauses ; but reversions arise *ex contractu*, constituting a distinct right in the person of a certain individual and his successors, which belongs to them, and is their property, just as much as the *dominium* of the lands, under its burdens and qualities, is the property of the fiar. It might be equally well maintained, that rights of servitude or liferent, or even a security for debt constituted by way of real burden in the investiture of the property, cannot be effectual without irritant and resolute clauses.

But the right to those lands was entirely personal ; and by the very nature of such rights, they must be subject to every condition, quality and exception, in the person of a singular successor, to which they were liable in the person of the original holder of the right. No person can take the right otherwise than it is : Being a mere *jus crediti* it cannot possibly be different in the assignee, from what it was in the original creditor ; Ersk. B. 2. Tit. 3. § 48. It is not here merely an unilateral personal deed, where there

E.

NO. 2. may be a distinction between the granting of a right and an obligation to grant it, (though contrary to the opinion of Stair, B. 2. Tit. 9. § 6.); but it is a mutual contract. While it remains personal on both sides, and unimplemented, it is clear, that the right of pre-emption cannot be defeated, unless it can be made out, that one party to a mutual contract, or his assignee, may take the benefit of that contract, while it still remains *in nudis finibus contractus*, without implementing the mutual clauses to the other party, or those in his right.

“ The Lords (6th March 1805) find, That Charles Cochrane, who granted the back-bond in question, in favour of Sir George Preston, had only a personal right to the lands of Kirkbrae, which never was completed by infestment, either in his favour or in that of his successor Lord Dundonald : Find, That the said back-bond never was inserted in the title of the said lands, though ordered to be so by the interlocutor of this Court, in 1781 : Therefore find it unnecessary to determine whether, if the back-bond had been so inserted in the titles, and infestment had followed, it would or would not have constituted a real burden on the lands : But find, That the personal right in Charles Cochrane, and his successor Lord Dundonald, did remain qualified by the condition in the said back-bond in favour of Sir George Preston ; and that the adjudication led by the creditors of Lord Dundonald, can only attach the said personal right, subject to the said condition : Find, That such interest as Lord Dundonald has in said lands, is properly comprehended in the summons of sale ; and therefore find, That Sir Robert Preston has now right to redeem said lands, on payment of the sum of L. 307 : 13 : 4, mentioned in said back-bond ; and decern accordingly.”

A& Solicitor-General Blair, Ross, Maconochie.

Alt. Williamson, Gillies. Agent, Rob. Watson.

Agent, Ja. Thomson, W. S.

Clerk, Menzies.

Fac. Coll. No. 204. p. 456.

1805. February 22. SOMMERVAILS against REDFEARN.

NO. 3.
A personal
right being
held in trust,
the truster

IN the books of the Edinburgh Glasshouse Company, stock to the amount of L. 2000 stood in the name of David Steuart. At that time, he was a partner in the firm of Allan, Steuart and Company ; which copartnership having been dissolved, a new one of David Steuart and Company, consisting

of Mr Steuart, and Alexander Sommervail, as partners, was formed. In NO. 3. the books of that concern, the stock was entered as the property of the company; and the reason why this did not appear in the books of the Glasshouse Company, was said to be a rule which prevented any company from being a stockholder; so that each was obliged to take his stock in the name of a trustee.

is preferable to the voluntary assignee of the trustee in the subject of the trust.

In 1796, the company of David Steuart and Company was dissolved, but the concerns were not immediately settled. In August 1797, Mr Steuart borrowed from Francis Redfearn, Esq; L. 1400 on his own account; in security for which, he assigned to him his share in the Glasshouse stock, standing in his name. On the day the assignment was granted, (23d August 1797) it was completed by intimation.

Alexander Sommervail insisted that he had a preferable claim over this stock, as belonging to David Steuart and Company.

A multiplepinding was brought in the name of the Glasshouse Company, calling into the field the trustee on the sequestrated estate of Mr Steuart, who had by this time stopped payment, Mr Redfearn and Mr Sommervail.

No competitor having appeared, Mr Redfearn (29th June 1801) was preferred.

Sommervail raised a reduction of the assignation to Mr Redfearn, which was remitted to the process of multiplepinding, and conjoined with it, and the Lord Ordinary "finds, That the purchase of the stock of the Edinburgh Glasshouse Company in question, was made in name of David Steuart as an individual, and not in name of David Steuart and Company: Finds, That Mr Steuart was not only allowed to remain in the quiet and undisturbed possession of said stock, as absolute proprietor, for a considerable time after the purchase, but for several years after the company of David Steuart and Company was dissolved; therefore, and in respect it is not alleged that the defender Francis Redfearn was *in mala fide* to accept the assignation under challenge, repels the reasons of reduction, assolizies the defender from the conclusions of the action, and decerns; and of new prefers him in the multiplepinding to the fund *in medio*, for payment of the sums contained in his interest produced; and decerns in the preference, and for payment accordingly."

Sommervail having reclaimed, the Court (18th January 1805) "Alter the interlocutors of the Lord Ordinary reclaimed against: Find the allegation of the stock in question having stood in the person of David Steuart, in trust for David Steuart and Company, relevant to exclude the assignment granted by David Steuart to the defender Francis Redfearn; and remit to the Lord Ordinary to proceed accordingly."

NO. 3. Mr Redfearn reclaimed, and

Pleaded: When a moveable right has once been formally vested in any person, as a holder of it, the subject of that right must be held to be his property, and as such is liable to his power of disposal. From circumstances attending the acquisition of such a right, he may lie under collateral and latent obligations to third parties, which, like other personal obligations, may be secured by means of legal diligence; but unless such be used, the right must remain unfettered by any latent claims of others than the debtor. The onerous and *bona fide* acquirer of such a personal right, by a regular transference from the person who *ex facie* is proprietor, regularly completed by intimation to the debtor, is secure against every latent claim of these parties. Intimation is the solemnity requisite for completing the right of the assignee, and for divesting the original cedent, to the effect of rendering the assignee preferable to all the other creditors of the cedent, and, among others, to those who may have obtained prior assignments from him to this very subject, but which those prior assignees have neglected to complete by intimation, who are, therefore, in no better situation than ordinary creditors of the common author; Stair, B. 1. Tit. 3. § 6.; Bankt. B. 3. Tit. 1. § 6.; Ersk. B. 3. Tit. 5. § 3. The prior assignee may have an action upon the warrandice in the assignment against the cedent; but this cannot affect third parties. Intimation is, in such a case, equivalent to possession of a moveable subject, and must therefore cut off every claim at the instance of mere personal creditors, which every person competing with the assignee, whose assignment is intimated, is held to be, whether he founds his claim upon a prior assignment and declaration of trust, or on any other ground whatever. It is true, that no one can confer upon another a better right in a subject than he possesses himself. If he has no right at all, none can be received from him; and if his right be qualified, the condition on which he holds it, must pass with his conveyance of it, according to the principles in the civil law, "*Nemo plus juris in alium transferre potest, quam ipse habet*," and, "*Assignatus utitur jure auctoris*." But this rule seems to apply merely to questions between an assignee and the original debtor or obligant in the right assigned, who cannot be subjected to a greater extent in favour of an assignee, than he would have been to the cedent; because it is an easy matter for the assignee, before he purchases the right, to make inquiry of the debtor, whether the debt is truly due, or if he has any counter-claim against the original creditor. The rule does not seem at all applicable to questions between an assignee and third parties, whose claim upon the cedent cannot be discovered by any inquiry or investigation. When it is said, that all exceptions competent against the cedent are good against the assignee, nothing more is meant, than that the debtor still may plead all the defences competent to him, against the debt as it stood in

the person of the cedent. It is admitted, that a posterior assignation first intimated, is preferable to a prior one which has not been intimated ; but there seems no difference between this case, where the person conveys a right which he once had, but which he had previously given away, and one who conveys a right which apparently stands in his person, but which, by a latent trust-deed, is held for behoof of others. In both cases, the simple form of intimation would have prevented the wrong, and in both the safety of commerce demands, that the same rule should be adopted. The decisions which have been quoted, may all be reduced to two classes, equally remote from the present case ; such as relate to questions between the assignee and the common debtor, and such as arise between the trustee and the mere personal creditors of the common debtor, not his onerous assignee whose right is completed by assignation. The mere personal creditors of the trustee can attach the subject only *tantum et tale* as it stood in his person ; but in the other case, the cedent is completely divested of every right which he had ; and a complete and absolute title to it is vested in the person of his onerous assignee, to the effect of giving him a preferable right over a prior assignee, who has neglected to complete his right by intimation, but for whom the cedent may very well be said to stand in the character of trustee.

If effect be given to latent personal claims, at the instance of third parties, the commerce of all kinds of stock, and other moveable securities will be greatly injured ; and it never can be necessary for an intending purchaser of such a right, to do more than to inquire if the subject really be vested in the person of his author, and if the debtor has no counter-claim against him.

Answered : When any person holds a subject in his possession, which is not his property, no act of his can transfer the property to another, to the prejudice of the real owner. When his right in it is limited, every right which he grants must be burdened with the limitations under which he holds it. Property in moveable corporeal subjects, can, by the law of Scotland, be transferred in no other way than by actual delivery ; but possession and property are by no means inseparable. A subject may be in possession of a person who is not entitled to exercise a single act of property, as the real owner may resume the possession whenever he thinks proper. In all cases where any one transacts with the possessor of a moveable subject, he runs the risk of finding that he holds it on such terms as do not entitle him to make it his own, or to dispose of it. He must trust to the character of the party with whom he deals. In the same manner, and even *a fortiori*, in incorporeal personal rights, the mere possession of the nominal right affords no more than a presumption regarding the property of it, and consequent right to transfer it to another. The person who is really the

NO. 3. proprietor, has alone the right of disposal. In incorporeal rights, an assignation intimated is equivalent to delivery of a moveable corporeal subject; but, in both, the nature of the right so transferred, depends upon the right vested in the former holder of it. If he be proprietor, the transference of possession completes the transference of property. If the cedent was truly unlimited proprietor, his assignee is secure by intimation; but if he be merely possessor of the document of debt, he may transfer the possession of it to another, which is all that he has; but he cannot transfer the property which he has not. The qualifications and exceptions which affected the right in his person being radical and intrinsic, must pass along with it into whatever hand it comes, for the real proprietor can never be thereby excluded from vindicating his own right, the rule being, *Assignatus utitur jure auctoris*. The right to this stock never belonged to Mr Steuart, but was a mere trust in him from the beginning, for his creditors; and as a trust does not require *intimation* to give it full effect, the right of the trusters was all along complete. Feudal rights stand on a different footing, on account of the faith due to the records; Stair, B. 1. Tit. 10. § 16.; B. 4. Tit. 1. § 21.; Bankt. B. 4. Tit. 45. § 34., § 402.; Ersk. B. 3. Tit. 5. § 10.; Keith against Irvin, 23d December 1635, No. 21. p. 10185.; Street against Hume, 9th June 1669, No. 4. p. 15122.; Gordon against Skein, 6th July 1676, No. 1. p. 7167.; Monteith against Douglas, 8th November 1710, No. 26. p. 10191.; Sir James Baird against Creditors of Murray, 4th January 1744, No. 15. p. 7737.

The Court "adhered."

Lord Ordinary, *Craig*, Act. Solicitor-General *Blair*, *Douglas*.
Agent, *Jo. Wauchope*, W. S. Alt. *Hay*, *Thomson*. Agent, *Jo. Anderson*, W. S.
Clerk, *Mackenzie*.

F.

Fac. Coll. No. 224. p. 508.

1808. June 21.

WILLIAM WALLACE Pursuer, against **JOHN OSBURN BROWN**, Writer to the Signet, Trustee for the Creditors of Robert Smith, Builder in Edinburgh, Defender.

NO. 4.

Of two con-
terminous
proprietors,
one built a
mutual

WHEN that part of the New Town of Edinburgh, consisting of Heriot-Row, and lying to the north of Queen Street, was projected, a plan was adopted, which contained the elevation of each house, and obliged the builders to have mutual chimney tops and gables.

When the execution of this plan was begun, the trustees of Heriot's Hospital, the superiors of the ground, had been in the practice, where one area was feued out, to pay the half of the mutual gable when the house was finished. This was done with the view of having the street finished with the more expedition; and the Hospital had an opportunity of being indemnified when the next area was feued out.

The Hospital altered this arrangement; and exposed certain lots with the following condition:—"1st, That the purchasers of the several lots shall be bound and obliged to carry up the respective buildings to the level of the street, and to complete the cellars and side pavement, between and the term of Candlemas 1804, and to have their houses completely roofed in between and the term of Martinmas 1804, and that under the liquidate penalty of L. 100, to be paid to the treasurer of the said Hospital by the purchaser of each lot, over and above performance, 2d, That the expositors are not to be at any expense for building mutual gables, but the purchasers shall have their recourse for the half of any mutual gables, upon the persons purchasing the adjoining area, who shall be bound to pay the same when the said contiguous purchaser begins to build, with interest thereafter."

NO. 4.
gable, and the other became bankrupt without paying for his proportion of it. The former was found to have a preferable claim to the expense of the gable upon the price of the property adjoining, and forming a part of the bankrupt's estate.

Two conterminous areas were purchased; the one on the east by Robert Smith, the bankrupt,—the other, on the west, by William Wallace, the pursuer. Smith was not infeft.

On his area the pursuer built a dwelling-house, of which the gable and garden-wall were mutual with his neighbour Smith; and Smith became bankrupt, without either paying the proportion of this mutual wall due by him, or building a house on his area.

Mr Osburn Brown, having been appointed trustee on the sequestrated estate, exposed the subject to sale, under a declaration, that "half of the mutual gable on the west is to belong to the purchaser;"—the defender thus taking on himself the question respecting the expense of the mutual gable. The pursuer became the purchaser. The trustee refused to prefer the pursuer for the half of the mutual wall; upon which he raised an action for the price; and the cause having been debated before Lord Craig, Ordinary, the following interlocutor was pronounced, (11th December 1806.)—"On hearing parties, find, that although there is a debt due to the pursuer for the erection of the gable in question, yet he has no preference on the subjects in question therefor."

The Court differed in opinion from the Lord Ordinary. By the plan prescribed to the feuar, any person building a house in this situation must erect a mutual gable. This proceeds not on any contract with the con-

NO. 4. terminous heritor, but from the necessity of his situation. The ground on which the mutual gable stands is common, mutual, and indivisible; and therefore there is no room for the maxim, *inædificatum cedit solo*. The gable, in fact, was the property of Wallace the builder, till paid for; and till then he had a right to prevent Smith, or his trustee, from using it, or adjecting to it any building.

The Court altered the interlocutor of the Lord Ordinary; and found the pursuer entitled to retain the price or cost of erecting one half of the gable in question; and, on advising a reclaiming petition, and answers, adhered, 21st June 1808.

Lord Ordinary, *Craig*. Act. Geo. Jos. Bell. Alt. D. Douglas et J. Harrower.
Agent Rich. Glegborn & J. Os. Brown. Clerk, Ferrier.

J. W.

Fac. Coll. No. 57. p. 215.

1808. June 22. WILLIAM MARTIN against JANET PATERSON.

NO. 5.

Circumstances in which a reservation in a disposition entering the sasine, and making part of the investiture, did not constitute a real burden on the lands.

ON the 23d day of August 1785, Joseph Mundell conveyed his moveable funds to Messrs Gordon and Goldie, as trustees. He likewise executed a disposition of his landed property in favour of his nephew, William Johnston, and his heirs, under burden of the sum of L. 800, payable to his trustees, to be applied in terms of the trust. After a narrative of love and favour, the disposition proceeds, "Likeas I, by these presents, with and under the reservations, burdens, provisions, and conditions under-written, give, grant, alienate, and dispone from me, and all others my heirs and successors, after my decease, to and in favours of the said William Johnston, his heirs, executors, and disponees whatsoever, absolutely and irredeemably, without any manner of reversion, redemption, and regress, All and Whole, &c. In which lands and others above disposed, I hereby bind and oblige me, my heirs and successors, duly and validly to infeft and seise the said William Johnston and his foresaids, with and under the burdens, provisions and conditions after expressed."

The first of these burdens and conditions is thus expressed. "Providing always, as it is hereby expressly provided and declared, that the said William Johnston and his foresaids, by their acceptance, shall be bound and obliged to make payment to Thomas Goldie of Craigmuir, commissary of Dumfries, and John Gordon, farmer at Newbridge, trustees named and appointed by me, of the sum of L. 800 Sterling, to be by them applied in terms of a trust-right and conveyance executed by me in their favour, of even date with these presents, and that against the term of Whitsunday or Martinmas that shall be one full year after my

“decease, with interest thereof from the first term of Whitsunday or Martinmas immediately subsequent to my decease, until payment, and a fifth part more of penalty in case of not due and punctual payment, as also to make payment to the persons after named of the yearly annuities under written, viz.” &c.

After enumerating these annuities, it is provided and declared, *2do*, “That these presents are granted by me, with the further burden of the payment of the sum of L. 200 Sterling to each of the children lawfully procreated of the body of the said William Johnston, surviving him.” And it is further declared, “That the subjects above disposed are in full of heirship, executry, or any other thing which the said William Johnston or his heirs can anyways ask by and through my decease, excepting so far as is provided in their favour by my said trust-right and conveyance, under which burdens, provisions, and conditions these presents are granted by me, and to be accepted of by the said William Johnston and his foresaids, and no otherwise.”

The precept of sasine ordains sasine to be given to the disponent in the lands, “but always with and under the burdens, provisions, and conditions before specified, which are hereby appointed to be engrossed in the infeftments to follow hereupon.”

On this precept infeftment accordingly followed in the person of William Johnston, the disponent. In the sasine, the disposition and precept in the terms and under the burdens above mentioned, are at large engrossed. “And Thomas Kerr in Daltonhook, as bailie in that part aforesaid, by virtue thereof, and of the office of bailiary thereby committed to him, gave and delivered heritable state and sasine, actual, real, and corporal possession, of all and whole the said three-pound land of old extent of Bengairhill and Bengair, &c. but with and under the servitude and privilege in favour of the purchaser of Upper Dormont, and the other burdens, provisions, and conditions before specified, to the said William Johnston, by delivering to him of earth and stone of the ground of the said lands, with all other necessary and usual symbols.”

Certain partial payments of the sums with which the disposition was burdened were made by Mr Johnston; but at his death there remained a balance of L. 240 Sterling, besides interest.

Previous to his death, Mr Johnston executed two deeds, by one of which he granted to his widow, Mrs Paterson, a liferent over a certain part of the lands, in which she was infeft *propria manu*; by the other, he conveyed his whole property to his eldest son, under the burden of certain provisions to his children, which were declared to be real liens on his lands.

In the mean time, the pursuer, Martin, paid up the balance due to Muddell's trustees, and acquired right to the debt and security held by them.

NO. 5. Having constituted the debt against Joseph Johnston the eldest son and heir of William, he then led an adjudication, and brought an action of mails and duties against Johnston, his tenants, and Mrs Janet Paterson the widow, insisting, that the sums contained in Mundell's disposition to William Johnston were real and preferable burdens. The Lord Ordinary (Craig) decerned in terms of the libel.

The cause then came before the Court by petition and answers.

Argument of the defender.

To realise a lien on lands, it is necessary that the burdens be directed against the lands themselves, and not merely be imposed on the disponent. Unless this be done, the appearance of such a debt in the investitures is insufficient. See Bankton, B. 2. p. 653, ; 19th July 1780, Allan, No. 78. p. 10265.

In numerous cases similar to the present, the mere specification of the burden has been found insufficient; 18th May 1792, Steuart against Home, No. 11. p. 4649.

In the present instance, although the burden is specified, and declared to be a condition of the disposition, yet it is no where declared to be a *real lien* on the lands.

Argument of the pursuer.

If the obligation was laid on Johnston and his heirs alone, it is not real or effectual against his onerous or rational deeds. If it is directed against the lands, and rendered obligatory against onerous singular successors by entering regularly into the investiture, the pursuer must be preferred. That the burden was meant to be real, is clear from the whole tenor of the deed.

In the dispositive clause, the lands themselves are disposed *under the burdens, reservations, &c.* which necessarily infer a real burden. The obligation to infeft is qualified by a reference to these burdens. In a subsequent part of the deed it is declared, that *these presents are granted with the further burden.* There afterward follows a clause wherein it is declared, that *under these burdens, provisions, &c. these presents are granted by me, and to be accepted by the said William Johnston, and no otherwise.* This is the very form of expression pointed out by Erskine, B. 2. Tit. 3. § 49. to denote a real burden.

The law does not require any specific *formula* of words, or any *voces signata*, to constitute a real burden. It is sufficient that there be an explicit declaration of the disponent's will, that it shall be real, and that intimation be made to the lieges by insertion in the investiture. All this has been accomplished in the present instance, in the manner pointed out by Lord Bankton as sufficient for the purpose, in the very passage which the defenders have quoted in their support.

A majority of the Court differed in opinion from the Lord Ordinary ; and observed, that, without requiring any technical form of expression for the

constitution of a real lien, it is necessary that the intention to impose a burden on land by reservation, should be expressed in the most explicit, precise, and perspicuous manner. In a clause by which onerous singular successors are to be affected, there must be no room for ambiguity ; but the present instance admits of a doubt ; and, therefore, the obligation in favour of Mundell's trustees ought not to be held as constituting a real burden in competition with Mrs Johnston's infeftment.

The following interlocutor was pronounced, (4th March 1808,) " The " Lords having advised this petition, with the answers thereto, alter the interlocutor reclaimed against ; prefer the petitioner upon her infeftment " produced, to the rents in question in the hands of the tenants, and decern ; " but find no expenses due ; and supersede extract till the first sederunt " day of May next."

On advising a reclaiming petition and answers, the Lords adhered, (22d June 1808.)

Lord Ordinary, *Craig.*

Act. *Geo Cranston.*

Alt. *Rob. Corbet.*

A. & W. Douglas, W. S. and H. J. Wylie, Agents.

Clerk, *Pringle.*

J. W.

Fac. Coll. No. 58. p. 217.

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